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No. 95

In the Supreme Court of the United States

OCTOBER TERM, 1995

KARL A. SCHLEDWITZ, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari, to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner was correctly denied a new trial, despite the government's failure to disclose material exculpatory evidence pursuant to *Brady* v. *Maryland* in response to an explicit defense request, on the ground that the defendant should have discovered the evidence on his own.

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PETITION FOR A WRIT OF CERTIORARI

Karl A. Schledwitz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinions below (Apps. A-J, *infra*, 1a-44a) are unreported, except for the dissent from the denial of rehearing en banc, which has been ordered to be, but is not yet, published.

JURISDICTION

The court of appeals entered its judgment on December 4, 1995. App, *infra*, 1a-12a. A timely petition for rehearing was denied on March 18, 1996 (App., *infra*, 36a-42a), and the petition for a writ of certiorari is accordingly due on June 17, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Rule 33 of the Federal Rules of Criminal Procedure provides in pertinent part:

> The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. * * *

STATEMENT

After his mail fraud conviction was affirmed on appeal, petitioner discovered that the prosecutors had failed to disclose important exculpatory evidence that he had specifically requested before trial pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963). The trial court nevertheless rejected petitioner's motion for a new trial, and the court of appeals affirmed. In the Sixth Circuit's view, petitioner

should have uncovered the exculpatory evidence on his own — notwithstanding the government's failure to disclose it. On that basis alone, the court discounted the non-disclosure as immaterial.

1. On January 21, 1992, petitioner was indicted in the United States District Court for the Eastern District of Tennessee on eight mail fraud counts arising from his involvement with certain Tennessee banks owned or controlled by Jacob ("Jake") Butcher and his brother, C. H. Butcher, Jr. C.A. App. 14-25. Counts One through Three — the only counts not dismissed by the trial court at the close of the government's case (see C.A. App. 541-542) — alleged that petitioner had devised a scheme to defraud "various Butcher-controlled banks" (*id.* at 15). In particular, petitioner was alleged to have obtained loans from the banks and thereafter used the proceeds "for the personal and political benefit of the Butchers" (*ibid.*). According to the indictment, petitioner applied for the loans in his own name, when in truth the loans were for the Butchers, "in order to deceive the lending banks as to the loans' true beneficiary and purpose" (*ibid.*). In return, the indictment added, petitioner "would not be personally responsible for repaying these 'loans,'" and "would and did receive numerous business opportunities from the Butchers and entities under their control, including, but not limited to, legal work." *Id.* at 16.

On February 6, 1992, United States Magistrate Judge John Y. Powers entered a discovery order requiring the government to produce "all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976)." C.A. App. 26, 28. To ensure that such materials would be forthcoming, petitioner also moved for production of "specific Brady material," requesting in particular exculpatory material derived from Jake Butcher. *Id.* at 37. The government responded that it

was "well aware" of its *Brady* obligations, but it insisted that it had "already provided the defendant with all non-*Jencks* [18 U.S.C. 3500] *Brady* material to the extent any exists." C.A. App. 53-54. Accepting the government's assurances, the Magistrate Judge denied petitioner's motion for *Brady* material, ruling that "[a]bsent some definite assertion that the government has actually withheld specific evidence, * * * the Court shall not order any additional disclosure." *Id.* at 64.

Over the course of a four-day trial, the government sought to prove that petitioner was a mere "nominee" on various loans he had secured from Butcher-controlled banks. According to the prosecutor, petitioner was "what's called a nominee; that's a front man or a straw man" (7/13/92 Tr. 7) on a series of loans whose proceeds were in fact used to benefit the Butchers. The evidence at trial was hotly contested: although the government sought to show that petitioner had used the proceeds of the loans to cover certain of the Butchers' expenses, petitioner offered substantial evidence that the loans had been entirely for his own benefit and that he remained fully responsible for repayment. See, *e.g.*, C.A. App. 479, 491, 509. After the trial court dismissed Counts Four through Eight for want of sufficient proof (*id.* at 541-542), the jury convicted petitioner on the remaining three counts. On December 20, 1993, the court of appeals affirmed the conviction. App., *infra*, 13a-20a.

2. On August 17, 1994, petitioner moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. In pertinent part, petitioner asserted that he had learned, only after the trial, that Jake Butcher had provided exculpatory information concerning petitioner during the course of a pre-trial interview with government agents. Petitioner had never been furnished with a report of that interview, and he contended that had the government disclosed the report the outcome of the trial would likely have been different. See C.A. App. 166-209. The government opposed the motion, asserting "that the prosecution need not

disclose allegedly exculpatory statements when they are readily available to the diligent defender." C.A. App. 215.

The trial court determined that the interview report had not, in fact, been produced prior to trial, and it ordered the government to turn it over so that the court could assess its significance. App., *infra*, 24a-28a. The government complied, submitting a 13-page report of an interview of Jake Butcher conducted by FBI and IRS Agents on October 31, 1985 — seven years before the petitioner's trial. C.A. App. 288-300. As it turned out, one of the interviewing agents had been IRS Special Agent J. Alan Horne, who later testified for the government at trial. Horne was presented to the jury as a neutral financial expert hired by the government to review financial records; the prosecution never revealed, and the defense did not know of, his role as an investigative agent on the case. See App., *infra*, 11a; C.A. App. 365-392, 516-521.

The Butcher interview report, a so-called FBI 302, contained numerous statements that directly and substantially exculpated petitioner. Among other things, Butcher told the agents that, with respect to one of the key loans in question, petitioner was *not* a "trustee" for him, nor had Butcher promised to make petitioner's interest payments on the loan. C.A. App. 291. Butcher also denied that his relationship with petitioner was responsible for petitioner's legal business. *Ibid.* And Butcher added that he had never directed others to assist petitioner's legal business. *Id.* at 292.

On January 31, 1995, the trial court denied the new trial motion. App., *infra*, 29a-33a. The court held that "[b]efore a new trial will be granted, the movant must establish 1) that the new evidence was discovered after trial; 2) that the evidence could not have been discovered earlier with due diligence; 3) that the evidence is material and not merely cumulative and impeaching; and 4) that the evidence would likely produce an acquittal." *Id.* at 30a (citing *United States* v. *O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986)). The court

recognized (App., *infra*, 32a) that the interview report contained several statements that were "favorable to [petitioner]." And it acknowledged (*id.* at 33a) that, absent disclosure by the government, the defendant could not reasonably have been expected to discover the report itself. Nevertheless, the court held (*id.* at 33a) that "Mr. Butcher's opinion, if not the existence of the FBI 302 report, could have been discovered prior to trial with due diligence; that the evidence, although relevant, is merely cumulative and would not have impeached a government witness; and that it is unlikely that, if the jury had known that Jake Butcher did not consider [petitioner] a 'nominee,' they would have acquitted him."

Petitioner then sought reconsideration of the trial court's ruling. C.A. App. 335-356. Petitioner contended that, even if he could have discovered Butcher's opinions on his own, he could not reasonably have been expected to discover the statement itself. Nor, he added, could he have discovered that one of the government's trial witnesses, Special Agent Horne, had been present for the Butcher interview and thus was not genuinely the objective financial expert he appeared to be at trial. Had this information been disclosed before trial, petitioner continued, he would have revised his trial tactics in two ways, each of which might have altered the outcome of this close case. First, with the benefit of a prior statement exculpating petitioner, defense counsel would have been willing to call Jake Butcher as a witness; absent that statement, counsel had been unwilling to risk calling Butcher for fear that his unrefreshed recollection would not have sufficiently supported the defense. C.A. App. 345, 355-356. Second, had petitioner's attorneys known of Agent Horne's role in conducting the underlying investigation, they could

have impeached his testimony on grounds of bias and prejudice. *Id.* at 348.[1]

The trial court denied reconsideration. App., *infra*, 34a-35a. The court stated (*id.* at 34a) that "[a]lthough [petitioner] comes back with additional information that, even with due diligence on the part of his attorneys, the existence of the FBI 302 report could not have been discovered prior to trial, this does not alter the Court's opinion that a new trial is not warranted in this case."

3. The court of appeals affirmed. App. 1a-12a. The court first ruled (*id.* at 8a-9a) that the district court had applied the wrong legal test in evaluating petitioner's claim. In particular, the court stated (*id.* at 8a), the Sixth Circuit's *O'Dell* test "is altered when the new trial motion involves material suppressed by the prosecution." In that event, the court explained (*ibid.* (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.))), "the standard becomes whether 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" To make such a showing, moreover, a defendant need not "demonstrat[e] by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal.'" *Id.* at 9a.

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[1] In support of his motion for reconsideration, petitioner submitted an affidavit by Jake Butcher. C.A. App. 355-356. In it, Butcher recalled having been interviewed in 1992 by petitioner's counsel but stated that he had no memory at that time of having been interviewed by the government some 7 years earlier. C.A. App. 356. Nor, Butcher added, did he have any recollection in 1992 of the questions he had been asked by the agents in 1985. *Ibid.* To the contrary, Butcher stated, he "had spent the last seven years trying to erase the memory of the events" of this case, and had "literally pleaded" with petitioner's counsel not to call him as a witness. *Id.* at 355.

The court nevertheless rejected petitioner's claim, holding that the prosecutor's failure to disclose the interview report was immaterial. The court acknowledged (App., *infra*, 11a) that petitioner could not have known that Jake Butcher's opinions were memorialized in an FBI 302. In the court's view, however, Jake Butcher was "'well known to be friendly'" to the defense, and thus petitioner "should have been aware of Butcher's opinions." *Id.* at 10a. Accordingly, the court concluded, "the failure to provid[e] [petitioner] with the FBI 302 is not a denial of a fair trial with regard to Butcher's substantive comments." *Id.* at 11a.

The court also rejected the contention that petitioner was prejudiced by his inability to use the interview report in cross-examining Agent Horne. App., *infra*, 11a. The court agreed (*ibid.*) that "[w]ithout the FBI 302 Report, [petitioner] had no way of knowing of the existence of the 1985 interview and Horne's role in it." The court concluded (*ibid.*), however, "that this type of impeachment does not satisfy the *Bagley* materiality standard and, therefore, does not require the granting of [petitioner's] motion for a new trial."

4. On March 18, 1996, the court denied rehearing. App., *infra*, 36a. In a detailed opinion that he ordered to be published (see *id.* at 44a), Chief Judge Merritt, joined by Judge Martin (see *id.* at 43a (amended order)), dissented. "This is a serious case of unconstitutional prosecutorial misconduct involving an obvious *Brady* violation." *Id.* at 37a. In the dissent's view, the withheld interview report "specifically and expressly exonerated [petitioner] of acting as Butcher's agent," and "[i]f believed, would have acquit[ted] [petitioner] of fraud and bad faith." *Ibid.* What is more, Chief Judge Merritt noted (*id.* at 39a), even if petitioner "'should have been aware of Butcher's opinion,'" that point is "misplaced in these circumstances because it is the availability of the statement itself to use in examination of Butcher that is the key." "Had the statement been available, the defense might have called Butcher * * * rather than

follow the unsuccessful strategy adopted in the absence of knowledge of the statement." *Ibid.* Without the interview report, moreover, the defense was unable to dislodge the "false impression" that Agent Horne was an "independent neutral expert" when he testified at trial. *Id.* at 41a.

These errors, the dissent concluded (App., *infra*, 41a-42a), made a material difference to the outcome of the case. "[W]e are not dealing with a strong case that one could have confidence would have resulted in a conviction in the absence of these due process problems." *Id.* at 41a. To the contrary, the dissent noted (*ibid.*), the case was "so weak" that the trial court considered outright dismissal at one point. And to make matters worse, "politics and political statements and charges" — against this "young Memphis lawyer and aspiring Democratic politician" — "pervaded the government's case from the opening statement until the end." *Id.* at 37a, 42a.

REASONS FOR GRANTING THE PETITION

Despite a specific pre-trial *Brady* request, the government failed to disclose an interview report in which, by the court of appeals' own admission (App., *infra*, 8a), Jake Butcher — a principal beneficiary of the alleged wrongdoing — had made a number of highly exculpatory statements about petitioner. The court below did not dispute that, had those statements and the report itself been disclosed, there was at least a "reasonable probability" that the result of this very close case would have been different. The court nevertheless discounted the non-disclosure as immaterial. Applying settled Sixth Circuit law, the court reasoned that petitioner *should have known* about Jake Butcher's opinions on his own. Accordingly, the court concluded, the government did not violate its *Brady* obligations by failing to produce the report.

The court of appeals' "due diligence" exception to *Brady* — according to which the government need not disclose exculpatory information that the defense can get some other way — is inconsistent with this Court's delineation of the

prosecution's disclosure obligations. Moreover, although several other circuits have endorsed the same exception to *Brady*, the Tenth Circuit, acknowledging the contrary authority, has squarely rejected it. Because the question whether *Brady* includes a "due diligence" exception is both recurring and important for the day-to-day operation of federal and state criminal procedure, review by this Court is warranted.

A. The Sixth Circuit's Due Diligence Exception To *Brady* Reflects A Conflict Among The Circuits

1. The Sixth Circuit has held, in a series of cases, that — even in response to a specific *Brady* request — prosecutors need not disclose exculpatory evidence that is available to the defense through other sources. In *United States* v. *Todd*, 920 F.2d 399 (6th Cir. 1990), for example, the court held that the government had no duty to disclose interview reports of key co-conspirators, despite a specific pre-trial request, where the defendant had access to the witnesses and knew that they could "possibly" exculpate him. *Id.* at 404-405. The court explained that the defendant was "aware" of certain "essential facts" — the identity of the witnesses and the "possibility" that they might help him — and therefore he could have "take[n] advantage of the exculpatory evidence." *Id.* at 405. Accord, *United States* v. *Clark*, 928 F.2d 733, 738 (6th Cir. 1991) ("No *Brady* violation exists * * * where the evidence is available to defendant from another source"); *United States* v. *Mullins*, 22 F.3d 1365, 1371 (6th Cir. 1994) (notwithstanding a specific request, "the government's failure to disclose potentially exculpatory information does not violate *Brady* * * * 'where the evidence is available to defendant from another source'").

The prosecutors invoked that exception in defending their failure to disclose the Jake Butcher interview report. "It has long been the law," the government told the Sixth Circuit, "that the prosecution need not disclose allegedly exculpatory statements when they are readily available to the diligent

defender." Gov't C.A. Br. 18-19. Citing *Clark* and relying at length on *Todd*, the government contended that "under the *Brady* doctrine, where the defense has equal access to the evidence, there is no duty of disclosure on the part of the government." *Id.* at 20. In the government's view (*id.* at 21), "[t]he district court's findings that Jake Butcher was 'friendly and available' is sufficient to destroy [petitioner's] claim."

The court of appeals agreed. Likewise relying on the *Todd* case, the court reasoned that petitioner "should have been aware of Butcher's opinions" and was therefore in a position "'to take advantage of the exculpatory evidence.'" App., *infra*, 10a-11a. Without regard to whether petitioner could reasonably have known about the prior *statement* (as opposed to "Butcher's opinions"); without regard to whether (or how) petitioner could possibly have *obtained* the written report itself elsewhere; and without regard to the importance of the government's non-disclosure, the court rejected petitioner's *Brady* claim for want of due diligence.

2. The Sixth Circuit's narrow conception of a prosecutor's *Brady* obligations is not unique. Indeed, in the *Clark* case (928 F.2d at 738), the Sixth Circuit traced its "due diligence" rule to the Eleventh Circuit's decision in *United States* v. *Davis*, 787 F.2d 1501 (1986), in which that court had held that "the *Brady* rule does not apply if the evidence in question is available to the defendant from other sources." *Id.* at 1505. The due diligence requirement has long been the law in the Eleventh Circuit. For example, in *United States* v. *McMahon*, 715 F.2d 498 (11th Cir. 1983), that court held that the government was not required to disclose, pursuant to a specific defense request, the reports of two psychiatrists who had examined the government's key witness (a former DEA agent). Citing Fifth Circuit case law, the court explained that "'the government is not obliged under *Brady* to furnish a defendant with information which * * * with any reasonable diligence, he can obtain himself.'" *Id.* at 501.

Because the defendant "should have known about the two psychiatric reports long before the day of trial," and because his counsel "could have contacted the doctors who prepared the reports," the prosecutors were not obligated under *Brady* to disclose the reports to the defense, even in response to a specific request. *Ibid.* The Eleventh Circuit has repeatedly reaffirmed that principle. See, *e.g.*, *United States* v. *Meros*, 866 F.2d 1304, 1308, cert. denied, 493 U.S. 932 (1989).

The Fourth Circuit, in a divided opinion, has likewise embraced the "due diligence" exception. *Barnes* v. *Thompson*, 58 F.3d 971 (1995). In that case, the court vacated a grant of habeas relief, concluding that the prosecutors had not violated their *Brady* obligations, notwithstanding their failure to honor a request for *Brady* information. In the court's view, "*Brady* requires that the government disclose only evidence that is not available to the defense from other sources, either directly or through diligent investigation." *Id.* at 975 n.4. "Nondisclosure, therefore, does not denote that no exculpatory evidence exists, but that the government possesses no exculpatory evidence that would be unavailable to a reasonably diligent defendant." *Ibid.* "Accordingly," the court concluded, "*Brady* affords a defendant no relief if he fails to pursue exculpatory evidence, notwithstanding his specific request for such evidence." *Ibid.*

Although Judge Murnaghan concurred in the judgment for other reasons, he vigorously rejected the proposition that prosecutors are free to withhold exculpatory evidence simply because, in their view, the defendant could reasonably discover it elsewhere. *Barnes*, 58 F.3d at 983-985. Judge Murnaghan pointed out that "a reasonable defendant would not have looked into the matter any further once the prosecuting attorney represented that the [government] did not possess exculpatory evidence." *Id.* at 984.[2]

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[2] See also *Stockton* v. *Murray*, 41 F.3d 920, 927 (4th Cir.

3. By contrast, the Tenth Circuit, in its decision in *Banks* v. *Reynolds*, 54 F.3d 1508 (1995), has emphatically rejected the "due diligence" exception, expressly disagreeing with the Eleventh Circuit case law from which the Sixth Circuit rule derives. In *Banks*, the government failed, in response to a pre-trial *Brady* request, to apprise the defense that two other suspects — including Norman Lee Hicks — had previously been arrested for the same offense for which the defendant was later convicted. Significantly, the defendant's lawyer, Leslie Earl, had represented Hicks on the earlier charge. The government argued (*id.* at 1516-1517) that Earl should therefore have been aware of Hicks' arrest, and thus "the prosecution had no obligation to turn over the [prior arrest] information."

The Tenth Circuit rejected the due diligence rule. True, the court observed, "if the defense already *has* a particular piece of evidence, the prosecution's disclosure of that evidence would, in many cases, be cumulative and the withheld evidence would not be material." *Banks*, 54 F.3d at 1517 (emphasis added). But explicitly disagreeing (*id.* at 1517 n.17) with the Eleventh Circuit, the court held (*id.* at 1517) that "the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge." "The only relevant inquiry," the court added (*ibid.*), "is whether the information was 'exculpatory.'" Because the withheld evidence in that case was both exculpatory and material (*id.* at 1517-1522), the Tenth Circuit affirmed a grant of habeas corpus relief. See also *Hatch* v. *State of Oklahoma*, 58 F.3d 1447, 1470 n.17 (10th Cir. 1995), cert. denied, 1996 U.S. Lexis 3649 (in deciding whether prosecutors committed a *Brady* violation, the court of appeals, following *Banks*, explicitly refused to

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1994) (*Brady* does not compel the disclosure of evidence available to the defendant from other sources, including diligent investigation by the defense).

"rely on the fact that the defense apparently was aware" of the undisclosed fact).

The present case is an appropriate vehicle for resolving this conflict among the circuits. Although the decision in the present case is unpublished, it follows — indeed, expressly relies on — settled Sixth Circuit case law absolving prosecutors of any duty to disclose exculpatory evidence where the defense could reasonably find it elsewhere. At least two other circuits afford prosecutors the same exemption from *Brady*. The Tenth Circuit does not — and as we next explain, the Tenth Circuit has much the better of the argument.

B. The Sixth Circuit's Decision Is Wrong

A due diligence exception from *Brady* is mistaken for several reasons. First, it unjustifiably constricts the government's *Brady* obligations. With a due diligence exception, a prosecutor need not honor a specific *Brady* request where he or she concludes — and a reviewing court later agrees — that the defendant could "reasonably" find the information on his own. But "'in the often competitive enterprise of ferreting out crime,'" prosecutors, no less than any other advocate, "simply cannot be asked to maintain the requisite neutrality with regard to their own investigations." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 449-450 (1971). There will be a natural instinct to overvalue the defense's capacity for finding favorable evidence on its own, and hence too grudging an instinct for disclosure. In addition, the motive for nondisclosure is increased by the prospect that the defense will be less than fully diligent, thereby relieving the prosecution of the need to deal with the exculpatory evidence at trial.

But that is not all. A prosecutor who withholds material in the face of a specific request thereby *encourages the defense to believe it does not exist*. *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (Blackmun, J.) ("an incomplete

response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist"). This skews the discovery process, prejudices the defense in its pursuit of exculpatory proof, and impairs the adversary system. The government should not be able to *discourage* the defense from believing there is exculpatory evidence and then defend that non-disclosure on the ground that the defense could have discovered the evidence on its own.

The due diligence exception also has a peculiar "Catch-22" quality. If a prosecutor withholds exculpatory evidence because he believes the defense can find it elsewhere, that judgment will either be right or wrong. If right, then the prosecutor will have a complete exemption from *Brady*, even if the defense fails in fact to find the evidence. If, however, the prosecutor is wrong — *i.e.*, the evidence *cannot* reasonably be found elsewhere — there would, admittedly, be no *Brady* exemption; but in that event, no one will likely unearth that *Brady* violation, precisely because the defense will fail to find the evidence on its own and will therefore be unable to file an appropriate motion.

The present case illustrates the unfortunate consequences associated with a due diligence exception to *Brady*. The court of appeals never considered the exculpatory nature of the FBI 302 — which, without more, should have sufficed to warrant its disclosure. The court likewise never analyzed the importance of that document — which, without more, should have satisfied the materiality standard under *Brady*. Instead, the court focused solely on petitioner's diligence in finding the evidence on his own. That was a substantial mistake in its own right.

But the court compounded that mistake by making unwarranted guesses about what could or should have been found by diligent counsel. The court surmised that petitioner could have learned, by interviewing Jake Butcher in 1992, the same things Butcher told the government in the 1985

interview. Even if that were the relevant inquiry, the court of appeals got it wrong. Butcher himself attested, in support of petitioner's new trial motion, that he "had spent the last seven years trying to erase the memory of the events leading to [his] incarceration." C.A. App. 355. Indeed, he added, by 1992 he could not recall any of the questions he was asked by the government during the 1985 interview. *Id.* at 356. What is more, Butcher explained that between 1985 (when the government interviewed him) and 1992 (when the defense interviewed him), he had grown "extremely paranoid, fearful of governmental reprisal and unsure of [him]self." *Ibid.* His basic agenda in 1992, he made clear, was to convince defense counsel, through his responses, that he would be a poor witness. As Butcher put it, he "literally pleaded" with defense counsel "not to involve [him]." *Id.* at 355.

On this uncontradicted record, the court had no basis for assuming, as it did, that petitioner "should have" learned from Jake Butcher the opinions Butcher had previously shared with the government. But as Chief Judge Merritt observed in his dissent (App., *infra*, 37a-42a), the panel's "due diligence" rule led it even further astray: the court failed to explain, even in passing, why the government's failure to produce the *FBI 302 itself* was immaterial — separate and apart from the *opinions contained* in the 302. As Chief Judge Merritt explained (*id.* at 39a), without the document itself the defense was significantly hobbled at trial. Armed with the prior written statement, the defense could have called Jake Butcher — an otherwise recalcitrant witness — secure in the knowledge that the prior statement would afford a refreshed recollection, rehabilitation, or impeachment. See *Kyles* v. *Whitley*, 115 S. Ct. 1555, 1571 (1995).

In addition, had the document been disclosed, the defense would have learned that Agent Horne was present for the 1985 interview, and it could therefore have "debunk[ed] the false appearance created for the jury that Horne was a disinterested expert hired by the government to review

defendant's financial records." App., *infra*, 40a.[3] And at the very least, through a skillful use of the Butcher memo during the cross-examination of Agent Horne, the defense could have called attention to *the government's failure* to call Jake Butcher as a witness, thereby "attack[ing] the reliability" of the government's case. *Kyles*, 115 S. Ct. at 1572. Cf. *ibid.* ("'[a] common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation'").

These errors and omissions are the inevitable byproduct of recasting the *Brady* duty into a speculative inquiry about what the defense could have or should have done — rather than focusing on what *Brady* is really all about: the exculpatory nature of requested evidence and its importance at trial. Those factors alone warranted a new trial on this record, but the court ignored them in favor of its inquiry into due diligence. The court of appeals' decision is clearly wrong and should be reversed.

C. The Sixth Circuit's Due Diligence Exception Is Also Inconsistent With This Court's *Brady* Cases

A "due diligence" exception from the government's *Brady* obligations cannot be squared with this Court's cases. First and foremost, it runs afoul of *Brady* itself. The prosecutor in *Brady* withheld from the defense an extrajudicial statement in which the defendant's accomplice had confessed to the homicide. The Court held that "the

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[3] The government proffered Horne to the jury merely as a former IRS investigator. C.A. App. 365-366. Horne stated that he was being compensated for his time at an hourly rate up to a maximum of $2,500. *Id.* at 367. He then analyzed a multitude of financial records, charts, and other documents in support of the government's theory that petitioner was simply a "nominee" on the loans for the Butchers. *Id.* at 368-392, 516-521.

suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87. It did *not* suggest that favorable evidence has been "suppressed" only where it is otherwise unavailable to the defendant through due diligence. If anything, the Court suggested just the opposite, noting that "[a] prosecution that withholds evidence *on demand of an accused* * * * does not comport with standards of justice." *Id.* at 87-88 (emphasis added).

More pertinently, in *Agurs* the Court declined the government's explicit invitation to adopt a "due diligence" exception to *Brady*. The question in *Agurs* was whether the prosecution's failure to disclose the victim's criminal record prejudiced defendant's due process rights. The government sought to pretermit the question of prejudice, however, by relying on the dictates of Fed. R. Crim. P. 33. Rule 33, which governs motions for a new trial based on newly discovered evidence, generally requires a defendant to show that the evidence "could not have been discovered beforehand in the exercise of reasonable diligence." U.S. Br. 9. Invoking that standard, the government contended (*id.* at 16) that a defendant cannot secure a new trial based on undisclosed evidence "[i]f the defense was on notice of the essential facts concerning exculpatory evidence before trial but elected not to investigate that information." According to the government, "respondent's counsel learned in pretrial interviews that the decedent likely had a criminal record" and "could easily have obtained the particulars of that record by subpoena to the police department" (*id.* at 17-18). "If the defense is not thereby charged with actual knowledge of that information, its subsequent failure to obtain decedent's conviction record constituted a failure to exercise due diligence and therefore forecloses the awarding of a new trial based on this evidence under Rule 33." *Id.* at 18.

The Court, however, rejected the government's invitation to apply the usual standards for newly discovered evidence. Those standards might apply, the Court explained, where the defendant bases his new trial motion on evidence obtained "from a neutral source after trial." *Agurs*, 427 U.S. at 111. But "the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category" (*ibid.*), the Court stated. "If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Ibid.* And that is especially true, the Court added, where the defense has made a specific request for the material. "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Id.* at 106.

In the Court's more recent *Brady* cases, it has never suggested that a defendant's failure to exercise due diligence — by locating the exculpatory evidence on his own — might excuse the government's *Brady* obligations. If anything, the Court has suggested just the opposite, at least in cases where the defense has requested *Brady* information and the government has provided an incomplete response. In *United States* v. *Bagley*, 473 U.S. 667 (1985), the government conceded (see *id.* at 682), and five Members of the Court agreed (see *ibid.* (Blackmun, J.); *id.* at 690 (Marshall, J., dissenting); *id.* at 714 (Stevens, J., dissenting)), "that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist." *Id.* at 682 (Blackmun, J.). Indeed, Justice Blackmun added, "the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the

nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption." *Id.* at 682-683.

And the Court's most recent *Brady* decision, *Kyles* v. *Whitley*, 115 S. Ct. 1555 (1995), contains not the slightest support for a due diligence exception to *Brady*. Again, if anything, quite the contrary is true: the Court described the prosecutor's duty of disclosure as "triggered by the potential impact of favorable but undisclosed evidence" (*id.* at 1565). It did not qualify that "trigger[ing]" event by reference to the defendant's own diligence in discovering the evidence independently.

In short, to the extent this Court's cases address the issue at all, they undercut a due diligence exception to the scope of prosecutors' duty of disclosure. This case affords the Court an opportunity to consider, and reject, that unwarranted exception to *Brady*.

D. The Question Presented Has Important And Recurring Implications For The Operation Of Federal And State Criminal Discovery

The scope of the government's *Brady* obligations is absolutely crucial to the day-to-day operation of the criminal justice system. Defense counsel file *Brady* requests in virtually every case, often (as in petitioner's case) with great specificity. They do so to obtain critical evidence — evidence that, by its very nature, may spell the difference between a verdict of guilty and one of not guilty, or (quite literally) between life and death. See *Kyles*, 115 S. Ct. 1555.

What is more, precisely because "[a] criminal defendant is entitled to rather limited discovery," at least in the federal system (*Degen* v. *United States*, No 95-173, slip op. at 5 (June 10, 1996)), defendants rely on *Brady* requests as a central source of discovery material. The "due diligence" exception impairs that regime. It authorizes the government to withhold exculpatory information — even to deny that any

exists — whenever the prosecutor believes that the defense, through a failure of its own diligence, may fail to find it elsewhere. Not only does such behavior deprive the defense of key evidence, it also sends the false signal that no such evidence exists.

The Tenth Circuit unequivocally rejects that evasion of *Brady*'s basic command, but the Sixth Circuit — joined by the Eleventh and the Fourth — plainly tolerates it. For the court below, it was sufficient that Jake Butcher was "known" to be friendly to petitioner. Based on that single, uncorroborated supposition, the court approved the government's failure to provide the interview report itself or to disclose the fact that one of its key trial witnesses had conducted the Butcher interview.

Finally, while we do not mean to suggest that there is an epidemic of *Brady* violations, neither is this an isolated case. As the *Washington Post* reported only three weeks ago, "[t]he failure of federal prosecutors to turn over Brady material has been a recurring problem in domestic federal prosecutions, derailing several important cases." *Washington Post*, May 28, 1996, at A9. And just last year, D.C. Bar Counsel Leonard H. Becker identified, among other reasons for judicial complaints against prosecutors, the failure "to disclose information exculpatory to the defense in violation of the Brady rule." *Washington Post*, June 14, 1995, at A24.

This case presents the Court with an opportunity to resolve a circuit conflict by rejecting an unjustifiable — but widely invoked — qualification on the scope of *Brady*. Further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1996

APPENDIX A

NOT FOR PUBLICATION

Nos. 95-5309/5409

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: Dec. 4, 1995]

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE
KARL A. SCHLEDWITZ,	)	
Defendant-Appellant.	)	

BEFORE: CONTIE, MILBURN, NORRIS, Circuit Judges.

PER CURIAM. In these consolidated appeals, defendant, Karl A. Schledwitz, who has been convicted on three counts of mail fraud pursuant to 18 U.S.C. §§ 1341 and 1342, appeals the district court's denial of his Federal Rule of Criminal Procedure ("Fed. R. Crim. P.") 33 motion for a new trial based on newly discovered evidence (No. 95-5309) and the denial of his motion for reconsideration (No. 95-5409). For the reasons that follow, we affirm.

I.

A.

Defendant Karl A. Schledwitz was an attorney in Memphis, Tennessee, who had several financial dealings with Jacob F. "Jake" Butcher and C.H. Butcher, two brothers who

ran a banking empire in Tennessee and Kentucky. The Butchers controlled at least twenty-five financial institutions and used the banks' money as their own. Schledwitz was accused by the government of being a "player" in the Butcher banking empire, from September of 1979 to March of 1983, by allowing his name to be used to borrow money from the Butcher banks when the money was actually used to personally benefit the Butchers. In return, Schledwitz would allegedly receive business for his law practice and loans for his own businesses. In total, the various Butcher banks loaned more than $1.5 million in Schledwitz's name. These often unsecured loans were provided to Schledwitz at a time when he did not have the personal income to justify such loans. When the Butcher banks failed, Schledwitz owed over $2 million in principal and interest, but he settled with the government by agreeing to repay only $120.000.

On January 21, 1992, defendant Schledwitz was charged in an indictment in the Eastern District of Tennessee with eight counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 1342, in relation to financial loans made to Schledwitz by banking institutions affiliated with Jake and C.H. Butcher. Schledwitz was alleged to have been involved in two mail fraud schemes. The first scheme related to a scheme to defraud the banks controlled by the Butchers, while the second scheme related to a scheme to defraud the successors in interests to those banks. At the trial, the district court granted a partial judgment of acquittal, dismissing counts four through eight of the indictment relating to the second scheme as there was no evidence that Schledwitz could have paid any more than he did to the successors in interest. As to counts one through three, the mail fraud charged in count one concerned several loans to Schledwitz to purchase United American Bank ("UAB") stock in banks controlled by Jake Butcher. Four banks controlled by Jake Butcher were involved: First and Farmers of Somerset, Kentucky; UAB of Memphis; UAB of Knoxville; and UAB of Hamilton County.

The mail fraud charged in counts two and three concerned transactions with C.H. Butcher and his banks.

At the trial, the prosecution produced evidence of Jake Butcher's scheme to create a market for bank stock in his banks and to make loans in furtherance of this scheme and in furtherance of Jake and C.H. Butcher's personal and political interests. As an alleged "player" in this scheme, the prosecution showed at the trial how Schledwitz received numerous loans from the Butcher banks when his income did not justify the loans.

With regard to the Jake Butcher loans involved in count one, Schledwitz borrowed approximately $450.000 to buy UAB of Knoxville stock at a time when his total annual income was $34,313. An associate of Jake Butcher's, Jesse Barr, testified at the trial that Jake asked Schledwitz to buy the UAB of Knoxville stock. Barr claimed he arranged for two loans to finance Schledwitz's stock purchases and that Schledwitz would provide Barr with numerous blank notes and blank personal checks so Barr could make the interest payments for him. One loan for $120,000 was from the Somerset bank and was later transferred to UAB of Knoxville. A second loan for $300,000 was from UAB of Memphis and was later transferred to UAB of Hamilton County. By shifting the funds to different banks, the loans appeared current and were less suspicious to bank examiners. These transactions were allegedly part of Jake Butcher's plan to create a market for the stock in UAB of Knoxville by having his friends buy UAB of Knoxville stock with loans from other Butcher banks so Butcher could sell the Knoxville bank at a higher price. Barr also testified that a large portion of the loan proceeds from Schledwitz's loans either went directly to Jake Butcher or were used to pay Butcher's bills.

The mail fraud charged in count one of the indictment occurred when Schledwitz wrote a letter to Barr on October 9, 1981, telling Barr that an interest payment was due on a note at UAB of Hamilton County and asking what he should

do to pay it. The bank sent Barr a renewal note on Schledwitz's loan since Barr was handling the note for Schledwitz. Counts two and three of the indictment charge similar transactions involving C.H. Butcher in which loans were made to Schledwitz but used to pay off C.H. Butcher's gambling debt at a casino in Las Vegas. On September 24, 1992, the jury convicted Schledwitz on these three counts of mail fraud. In an unpublished opinion, we affirmed Schledwitz's conviction. *See United States v. Schledwitz*, 14 F.3d 603 (6th Cir. 1993) (unpublished per Curiam), *cert. denied*, 114 S. Ct. 2679 (1994). Schledwitz was sentenced to six months in a halfway house.

B.

Prior to the trial, defendant Schledwitz requested that the prosecution provide him with exculpatory evidence in compliance with *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, defendant requested

> [a]ny prior testimony, which tends to exculpate the defendant, made to the department of Justice, the United States Attorney's office, the FDIC, other federal agencies, and/or the Grand Jury by the following individuals:
>
> . . . Jacob H. "Jake" Butcher.

J.A. 37. In response, the prosecution affirmed that it had complied with its *Brady* obligations and had supplied defendant with all evidence subject to *Brady*. However, on August 17, 1994, Schledwitz filed a motion for a new trial pursuant to Fed. R. Crim. P. 33 based on newly discovered evidence, information given to the defense by Jake Butcher's lawyer, William Ramsey, that, prior to Schledwitz's trial, Jake Butcher had been interviewed by agents from the Federal Bureau of Investigation ("FBI") concerning Schledwitz.[1]

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[1] The motion also referred to C. H. Butcher's grand jury

Ramsey remembered that Jake Butcher had made several exculpatory statements concerning Schledwitz and that these comments seemed to displease the government agents. In his motion for a new trial, defendant requested that the prosecution disclose this information. The prosecution responded to the motion by assuring the district court that the report from the Butcher interview had been supplied to defendant in conjunction with a separate prosecution in Memphis of Schledwitz.[2] However, Schledwitz's attorneys for the Memphis trial issued affidavits denying any knowledge of such an interview. The district court found that there was no dispute that the report relating to the interview was not produced in the trial in the Eastern District, assumed that it was not produced at the Memphis trial, and then ordered the production of documents relating to the 1985 interview.[3]

Complying with the district court's order, the prosecution produced a thirteen page FBI 302 report of an interview with Jake Butcher by agents from the FBI and Internal Revenue Service ("IRS") on October 29, 1985, at the Federal Prison Camp in Atlanta, Georgia. In that interview, Butcher was questioned extensively about Schledwitz's involvement with Butcher and his banks. The FBI 302 report reveals that Butcher told the agents that he had approached Schledwitz as a friend to offer him some bank stock that some of Butcher's

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testimony, but the district court later concluded that testimony was inculpatory and not discoverable since C.H. Butcher was not called as a witness at the trial.

[2] Schledwitz had been tried on other related charges as a co-defendant with Harold Ford in a 1990 Memphis trial.

[3] In their brief, the United States argues that defendant was aware of the existence of the FBI 302 report prior to the trial. However, the district court did not make this finding, and the weight of the evidence supports defendant's assertion that he did not know of the 1985 Butcher interview until after the trial.

other friends wanted to sell. Although Butcher admitted that he frequently assisted others in financing purchases of stock from his bank, Butcher could not remember whether he arranged financing for Schledwitz. The report further shows that Butcher stated that Schledwitz did not hold bank stock as a "trustee" for him, that he never told Schledwitz he would take care of interest payments on the loans, and that he never directed people to Schledwitz's law practice.

In addition to the substantive statements of Jake Butcher, the FBI 302 report revealed that Jay Horne was one of the IRS agents present at the interview. At the trial, Horne was the prosecution's only expert witness, and he was presented as a neutral advisor who had been hired by the government to trace Schledwitz's financial records. No mention was ever made by the prosecution of Horne's role in the investigation of Schledwitz in 1985.

On January 31, 1995, the district court denied defendant's motion for a new trial based on the newly discovered FBI 302 report, holding that,

> Mr. Butcher's opinion, if not the existence of the FBI 302 report, could have been discovered prior to trial with due diligence; that the evidence, although relevant, is merely cumulative and would not have impeached a government witness; and that it is unlikely that, if the jury had known that Jake Butcher did not consider Mr. Schledwitz a "nominee," they would have acquitted him.

J.A. 331-32. On February 10, 1995, defendant filed a timely notice of appeal of the denial of his new trial motion in Case No. 94-5309.

Also on February 10, 1995, defendant made a motion for reconsideration of the denial of his new trial motion. In making his motion for reconsideration, the defendant presented an affidavit from Jake Butcher, who did not testify at Schledwitz's trial, stating that although he was interviewed

by one of Schledwitz's attorneys in 1992 prior to the trial, he did not disclose the existence of the 1985 interview because he did not recall it. The defense also presented an affidavit from Schledwitz's trial attorney, W. Thomas Dillard, detailing how the FBI 302 report would have altered defense strategy. On February 23, 1995, the district court denied defendant's motion for reconsideration. Schledwitz filed a notice of appeal pertaining to the denial of his motion for reconsideration on March 9, 1995. Since that appeal was untimely,[4] a show cause order was issued directing Schledwitz to show cause why his appeal should not be dismissed for lack of jurisdiction. By an order of May 10, 1995, the district court allowed the defendant an enlargement of time to file his appeal, rendering the March 9, 1995, appeal in Case No. 94-5409 timely. These appeals were then consolidated.

II.

A.

Defendant Schledwitz argues that the district court applied an incorrect legal standard and erred in denying his motion for a new trial based on newly discovered evidence since the newly discovered evidence was suppressed by the prosecution in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). "Motions for a new trial based on newly discovered evidence are disfavored," and we will not reverse the denial of a new trial motion unless there is "'clear abuse of discretion'." *United States* v. *O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986) (quoting *United States* v. *Allen*, 748 F.2d

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[4] *See United States* v. *Hatfield*, 815 F.2d 1068, 1073-74 (6th Cir. 1987) (requiring that notices of appeal from orders denying a motion for a new trial under Fed. R. Crim. P. 33 be filed within ten days from the docketing of the order being appealed).

334, 337 (6th Cir. 1984) (per curiam)), *cert. denied*, 484 U.S. 859 (1987).

The district court denied defendant's new trial motion based on the four part test for new trial motions articulated by this court in *O'Dell:*

(1) the new evidence was discovered after the trial;

(2) the evidence could not have been discovered earlier with due diligence;

(3) the evidence is material and not merely cumulative or impeaching; and

(4) the evidence would likely produce an acquittal.

O'Dell, 805 F.2d at 640 (quoting *United States* v. *Barlow*, 693 F.2d 954, 966 (6th Cir. 1982)). However, we held in *O'Dell*, pursuant to *Brady* v. *Maryland* and its progeny, that the four part test is altered when the new trial motion involves material suppressed by the prosecution. *O'Dell*, 805 F.2d at 641. When the new trial motion is based on evidence specifically requested by the defendant but withheld by the prosecution, the standard becomes whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring)).

In the present cast, defendant Schledwitz presents new evidence which he specifically requested from the prosecution but was not given. Only after the trial did defendant learn of the FBI 302 report of the interview with Jake Butcher in 1985. This FBI 302 report is favorable to Schledwitz since in that interview Butcher denies Schledwitz's role as his "trustee" and denies taking care of Schledwitz's interest payments. Therefore, this new evidence should be analyzed under the *Bagley* materiality standard requiring a "reasonable probability that, had the evidence been disclosed to the

defense, the result of the proceeding would have been different" rather than the four part *Barlow* standard requiring a likelihood of acquittal. Since the district court applied the much stricter *Barlow* standard in denying defendant's new trial motion, it erred as a matter of law.

In *Brady*, the Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87. For a constitutional violation to occur, the evidence suppressed by the prosecution must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Agurs*, 427 U.S. 97, 108 (1976). Recently, the Supreme Court has expounded on the meaning of the *Bagley* materiality standard for determining when the prosecution commits a constitutional violation in suppressing evidence. In *Kyles* v. *Whitley*, 115 S. Ct. 1555, 1566 (1995), the Court held that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Nor is the *Bagley* materiality test a sufficiency of the evidence test requiring the defendant "demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 115 S. Ct. at 1566. Further, a *Brady* violation can never be harmless error. *Id.* The Court also noted that the *Bagley* analysis is not applied "item-by-item" but is applied collectively to all of the suppressed evidence. *Id.* at 1567.

Defendant Schledwitz argues that the FBI 302 report detailing the interview with Jake Butcher is material evidence under the *Bagley* standard. In making his argument, defendant presents two ways in which the new evidence could have been used at trial. First, by cross-examining the prosecution's only expert witness, Jay Horne, the defense could show that Jake Butcher did not consider defendant to be

his nominee and that Butcher denied taking care of defendant's interest payments on the loan. This substantive evidence, the defense argues, casts doubt on the allegations of mail fraud leveled at the defendant and, moreover, calls into question the reliability of the prosecution's case since they put Jesse Barr on the stand, because he testified in their favor, but refused to call Butcher as a witness because his testimony was exculpatory to Schledwitz.

Second, the defendant argues that the new evidence could be used to impeach Horne's testimony since he was present at the 1985 interview with Butcher. According to the defense, this shows Horne's bias against defendant since, as an IRS agent, he investigated the defendant and, thus, was not the disinterested expert witness he was portrayed as at the trial.

However, the United States argues that although the *Bagley* standard of materiality is the appropriate one to use, since the district court found that the new evidence was cumulative and not impeaching, there is no reasonable probability that the FBI 302 report could have altered the outcome of the trial. The United States also argues that the FBI 302 report should have been known to defendant if he had only exercised due diligence and, therefore, can not constitute *Brady* evidence.

It can hardly be argued by defendant that the statements made by Butcher meet the *Bagley* materiality test since the defendant had to be aware of Butcher's opinion contained in the FBI 302 report. The district court found that "Mr. Butcher was well known to be friendly and available as a witness [and] known to have testified that there was nothing illegal about Mr. Schledwitz's role in [his] banking maneuvers." J.A. 330. Indeed, defendant's counsel interviewed Butcher prior to the trial. Clearly, defendant's counsel could have called Jake Butcher to the stand at the trial to elicit his favorable statements, but they chose not to do so. Since defendant should have been aware of Butcher's

opinions, the failure to provide defendant with the FBI 302 report is not a denial of a fair trial with regard to Butcher's substantive comments. *See United States* v. *Todd*, 920 F.2d 399, 405 (6th Cir. 1090) (holding that there is no *Brady* violation when the defendant "was aware of the essential facts that would enable him to take advantage of the exculpatory evidence").

As to defendant's argument with respect to the impeaching value of the evidence in cross-examining Horne, we note that impeachment evidence can constitute *Brady* material. *Bagley*, 473 U.S. at 676. Without the FBI 302 report, defendant had no way of knowing of the existence of the 1985 interview with Butcher and Horne's role in it. Indeed, defendant requested all reports from any interviews with Jake Butcher and relied on the prosecution's representation that all reports had been produced. Thus, defendant could have attempted to impeach Horne's expert opinion by showing Horne was an IRS agent investigating Schledwitz in 1985. However, we conclude that this type of impeachment does not satisfy the *Bagley* materiality standard and, therefore, does not require the granting of defendant's motion for a new trial. The absence of this "impeaching evidence" from the trial does not "undermine[] confidence in the outcome of the trial" and does not "deprive[] the defendant of a fair trial." *Id.* at 677. Accordingly, although the decision of the district court to deny defendant's motion for a new trial was based on an incorrect legal standard, we will not reverse that decision since, under the correct standard, there is no reasonable probability that the outcome of the trial would have been different. *See Helvering* v. *Gowran*, 302 U.S. 238, 245 (1947) (permitting appellate courts to affirm a ruling which relied upon the wrong ground if the decision is correct).

B.

Defendant Schledwitz also appealed the district court's denial of his motion for reconsideration of the denial of his

motion for a new trial. Federal Rule of Appellate Procedure 28(a)(4) requires that appellant's brief "contain the contentions of the appellant on the issues presented." Since defendant did not raise any issue or make any argument challenging the district court's denial of his motion for reconsideration in his briefs on appeal, this issue is deemed waived. *McMurphy* v. *City of Flushing*, 802 F.2d 191, 198-99 (6th Cir. 1986).

III.

For the reasons stated, the orders of the district court are AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

No. 92-6314

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: Dec. 20, 1993]

UNITED STATES OF AMERICA,	)	
	)	ON APPEAL FROM THE
Plaintiff-Appellee,	)	UNITED STATES
	)	DISTRICT COURT FOR
v.	)	THE EASTERN DISTRICT
	)	OF TENNESSEE
KARL SCHLEDWITZ,	)	
	)	
Defendant-Appellant.	)	

BEFORE; RYAN and BOGGS, Circuit Judges; and ROSEN, District Judge.*

PER CURIAM: Karl Schledwitz appeals from his conviction on three counts of mail fraud. He contends that he was tried in violation of the statute of limitations, and complains of several procedural errors at trial. For the reasons given below, we affirm the conviction.

I

Karl Schledwitz was an attorney in Memphis, and an associate of Jacob F. Butcher and C.H. Butcher, Jr., who together controlled a number of banks in Tennessee and

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* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

Kentucky. Schledwitz was allegedly a "player" in their group, in that, according to the government, he agreed to take out a large number of loans from various of the Butchers' banks with no intention or ability to repay them. In return, the Butchers sent him legal work, and allowed him to keep some of the proceeds of the loans. The debt service on the loans was to be paid by taking out ever larger loans to cover it. During the course of the scheme, through 1982, Schledwitz took out over $1.5 million in loans, despite the fact that his income in 1982 was $52,163, his all-time high.[1] That the loans were fraudulent was evidenced in part by the fact that his income and business enterprises did not justify granting him the loans, and that it was not in the banks' interest to make the loans.

During the course of the investigation, Schledwitz and the government executed four successive statute of limitations (SOL) waivers. The final waiver, executed on May 26, 1988, read as follows:

> WHEREAS, attorneys for the United States have indicated that there are possible criminal charges which may be brought against KARL A. SCHLEDWITZ, either in the Eastern District of Tennessee or the Western District of Tennessee; and
>
> WHEREAS, at least some of the possible charges that may be brought by the United States against KARL A. SCHLEDWITZ conceivably could be barred by the applicable statute of limitations; and
>
> WHEREAS, the attorneys for both the United States and KARL A. SCHLEDWITZ, and KARL A.

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[1] His income was as follows: 1978, $13,293; 1979, $34,313; 1980, $28,385; 1981, $31,994. After the banks' collapse, Schledwitz had over $1.5 million in obligations with the FDIC, which he settled for $90,000, and $485,000 in obligations to the SIBC, which he settled for $30,000.

SCHLEDWITZ himself, desire to have discussions regarding the disposition of those possible charges;

IT IS, THEREFORE, AGREED that KARL A. SCHLEDWITZ will, and does hereby, waive the application of the statute of limitations for a period of ninety (90) days from the judgment of conviction, acquittal, dismissal or other resolution of all pending charges in United States v. Schledwitz, CR. 87-20193-H, as to any charge which might have been brought but which was delayed because of this Agreement and Waiver. KARL A. SCHLEDWITZ agrees to this waiver after being fully advised by his attorney of the legal consequences of this Agreement and Waiver.

This Agreement and Waiver is in addition to the Agreement to Waive Statute of Limitations executed by the parties on May 18, 1987, July 7, 1987, and January 5, 1988, and it is the intent of the parties that this Agreement and Waiver extend the May 18, 1987, July 7, 1987, and January 5, 1988 Agreements for an additional ninety (90) days from and after the judgment of conviction, acquittal, dismissal or other resolution of all pending charges in United States v. Schledwitz, CR. 87-20193-H.

On April 27, 1990, Schledwitz's trial in the United States District Court for the Western District of Tennessee (CR-87-20193-H) ended in a mistrial. on January 21, 1992, Schledwitz was named in an eight-count indictment in the Eastern District of Tennessee in the case at hand. Among the claims in the indictment was that Schledwitz borrowed $40,000 from the City and County Bank of Roane County (C&C Roane) to repay a C.H. Butcher gambling debt at Aladdin's Castle in Las Vegas, and that he borrowed $115,000 from the City and County Bank of Anderson. County (C&C Anderson) to promote the Butchers' political interests in West Tennessee.

On March 6, 1992, Schledwitz filed a motion to dismiss Counts 1 through 7 of the indictment on the ground that the SOL precluded the prosecution and that the SOL waivers he had executed had expired. In other words, the indictment was brought too late. While that motion was under consideration, on March 30, 1992, Schledwitz-filed a second motion to dismiss the indictment, claiming that the agreement to waive the SOL precluded the government from bringing the instant prosecution until all of Schledwitz's other cases itemized in the agreement were resolved. Schledwitz at that time was defending himself on charges in federal court in Memphis, charges which ended in a mistrial. In other words, Schledwitz was arguing that the indictment was brought too soon.

The district court ultimately denied Schledwitz's motions and allowed the case to go to trial. After the close of the government's proof, the district court granted Schledwitz's motion for a judgment of acquittal as to Counts 4-8. He was found guilty of Counts 1-3, each of which was for mail fraud, in violation of 18 U.S.C. § 1341. He appeals, claiming that his prosecution was barred by the SOL and alleging defects at trial.

II

The district court's interpretation of the meaning of the SOL agreement between the government and Schledwitz is a factual finding. Therefore, we review for clear error.

A defendant may waive statutory rights. *United States* v. *Del Percio*, 870 F.2d 1090 (6th Cir. 1989). The agreement was sufficiently specific that a person of normal intelligence could understand the waiver. Furthermore, Schledwitz himself is an attorney, he was represented by counsel, and he surely understood, or should have understood, the terms of the agreement. We have no trouble in finding that Schledwitz could, and did, waive the statute of limitations.

The agreement states that the government may not start a prosecution against Schledwitz any later than ninety days after the charges referred to in the agreement are resolved. A mistrial is not a resolution. Therefore the statute of limitations as contemplated in the waiver had not run.

At oral argument, Schledwitz contended that the government was not allowed to start prosecuting him until the other charges were resolved and 90 additional days had passed. He also argued that the waiver would not be valid after the 91st day. This interpretation would produce the odd result that prosecution would be barred for a certain period of time, revive for one day, then be barred once again.

We find that the document by its terms prohibits the government from waiting for a period longer than ninety days after the charges mentioned in the waiver agreement were resolved. There was nothing in the document even hinting that a prosecution started at any earlier time would be premature.

III

Schledwitz argues that there was insufficient evidence to prove that the communication forming the basis of his convictions were mailed. He is correct when he asserts there was no direct proof that the documents at issue were mailed: the envelopes in which the documents were received were not introduced into evidence. However, it is not necessary to use direct evidence to prove all the elements of the crime. Circumstantial evidence alone can be sufficient. The standard of review is whether, after looking at the evidence in the light most favorable to the government, any reasonable person could find the defendant guilty beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307, 99 S. Ct. 2781 (1979).

Count 1 charged the mailing of a September 29, 1982 letter from Terry Bridgman, an officer of United American Bank (UAB) Hamilton, to Jesse Barr in Knoxville, Tennessee, relating to a $300,000 loan made by UAB

Hamilton.[2] The letter stated: "Enclosed please find a renewal note an Karl Schledwitz for his note which is due July 31, 1982. He is also past due on interest for 7/31/82 . . . and 8/31/82." The document offered into evidence was an unsigned copy of the letter Bridgman sent.

Evidence adduced on Count 1 circumstantially showed that normal practice in Bridgman's office was to use the United States Postal Service. A witness testified that the standard practice in the office was to use the mail service. The fact that the witness did not have an independent recollection of the mailing is not fatal to the charge. The letter at issue refers to a renewal note, and Government Exhibit #32 was the executed renewal note. The government is not bound to eliminate speculation on all other possible routes the letter and renewal note may have taken, notwithstanding Schledwitz's assertion that he may have gone into the bank one day and executed the renewal note in person.

The mailing charged in Count 2 was a letter from Frank Knies, an officer of C&C Roane, to Schledwitz, which read:

> Enclosed is a renewal note and your commercial loan payment notice. Please sign the note where indicated by the X and return in the enclosed self-addressed envelope along with your principal and interest payments to this office.

Count 3 charges the mailing of the renewal note charged in the Count 2 mailing, along with a principal and interest payment.

Knies testified that the Count 2 letter was sent through the U.S. mail and that the Count 3 renewal was received in

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[2] The mail fraud statute does not require that the defendant himself mail a document. It is sufficient that his conduct caused others to mail qualifying documents.

the U.S. mail — though he did not as a matter of course attend to his mail directly. The government entered into evidence a copy of the executed renewal note, a letter acknowledging receipt of the note, and the loan history card showing receipt of the payment. Furthermore, the Count 2 letter states that a self-addressed stamped envelope is enclosed. Therefore, a reasonable juror could find that the relevant documents were mailed, and did constitute the offense of mail fraud.

IV

Schledwitz moved for a judgment of acquittal on Counts 2 and 3 of the indictment, claiming that the government had failed to establish a link between the mailings and the scheme to defraud. The district court denied the motion, and he renews the argument on appeal.

The government charged mail fraud under 18 U.S.C. § 1341. All the government needs to show is the general fraudulent scheme, and mailings to support the scheme. *United States* v. *Montgomery*, 980 F.2d 388, 393-94 (6th Cir. 1992), The evidence as to the items must be sufficient, but the nexus between the two can be quite slight, and many of the specifics of the fraud need not be itemized. *See United States* v. *Betancourt*, 838 F.2d 168, 174 (6th Cir.), *cert. denied*, 486 U.S. 1013, 108 S. Ct. 1748 (1988) (conspiracy).

The $40,000 loan was a fraud on the bank, without regard to its purpose, because Schledwitz knew that he could not repay it. In Schledwitz's best year, 1982, his interest obligations alone exceeded $170,000, while his income was less than $53,000. The president of C&C Roane testified that he made the loan because C.H. Butcher told him to, that he did not know what Schledwitz was going to do with the money, did not know whether Schledwitz would be able to repay the loan, and had no banking relationship with Schledwitz.

This nexus also means that the government neither constructively amended, nor varied, the indictment. The indictment includes those loans the government contended were a part of the fraud scheme. Schledwitz knew what he had to defend against--that the loans in that section of the indictment that spelled out the frauds were improper. Schledwitz received proper notice.

V

Finally, Schledwitz argues it was reversible error to deny his motion for a new trial after the dismissal of Counts 4-8. He complains that the jury learned about the Memphis indictment and that there might have been some difference in the admissible evidence were he granted a new trial on Counts 1-3.

Schledwitz did not move either before or during trial for relief from prejudicial joinder. The trial court specifically instructed the jury that the dismissal of Counts 4-8 should have no bearing on their deliberations in Counts 1-3, and the court gave Schledwitz's proposed instruction that the jury should only consider evidence presented as to Counts 1-3. In addition, much if not all of the evidence that Schledwitz objects to would have been admissible even had the two sets of counts been severed. He has made no showing of prejudice either from misjoinder or failure to grant a new trial.

For the foregoing reasons, we AFFIRM the judgment of the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

[Filed: Sept. 22, 1994]

UNITED STATES OF AMERICA	)	
	)	
v.	)	NO. CR-1-92-13
	)	
KARL A. SCHLEDWITZ	)	

ORDER

This was a criminal case in which defendant Karl A. Schledwitz was charged with participating in two mail fraud schemes. Counts One through Three related to a scheme to defraud certain banks controlled by unindicted co-participants in the scheme, Jacob Butcher and C.H. Butcher, Jr. Counts Four through Eight, which were dismissed by the Court, related to a scheme to defraud the successors in interest to those same banks. Mr. Schledwitz was convicted, on Counts one through Three and his conviction has been upheld by the United States Court of Appeals for the Sixth Circuit. The case is back before the Court on Mr. Schledwitz's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. [Doc. 159].

In support of his motion, Mr. Schledwitz contends that, since the trial of this cause, he has discovered the existence of exculpatory statements, made by both Jacob and C.H. Butcher, Jr. which the government possessed, recognized as exculpatory, but failed to disclose before or during his trial. While he does not know the content of all of these statements, he can tell from a letter from Assistant U.S. Attorney Gary S. Humble to then U.S. Attorney John W. Gill, dated February 15, 1991, that at least some of the statements

pertain to a transaction which was a principal portion of the scheme alleged in Count I of the indictment. (The June 15, 1982, loan to Mr. Schledwitz of approximately $40,000 by the City and County Bank of Roane County, which was alleged to have been used to pay a gambling debt of C.H. Butcher, Jr.'s to the Aladdin Hotel and Casino in Las Vegas, Nevada.) Counsel for Mr. Schledwitz suggest, by affidavit, that disclosure of these exculpatory statements, made by the unindicted co-participants in the illegal scheme charged in the indictment, would likely have resulted in a different outcome at trial. They are of the opinion that Mr. Schledwitz was denied a fair trial.

The United States does not deny the existence of these exculpatory statements; does not deny that counsel for Mr. Schledwitz moved for disclosure of any such statements; and does not deny that it failed to disclose them either before or during the course of trial. It does deny that these facts entitle Mr. Schledwitz to a new trial. First, the United States points out that C.H. Butcher, Jr. and Jake Butcher were close associates of Mr. Schledwitz and that, if he did not actually know of the exculpatory statements they made on his behalf, he could have obtained them with due diligence. It argues further that statements made by the Butchers would not have been material to the case, would have been merely cumulative in light of Jesse Barr's testimony, and would have been so incredible that they would not likely have produced an acquittal. The United States also offers in evidence several affidavits prepared by C.H. Butcher, Jr. in April of 1990, and given to Mr. Schledwitz or his attorney in the trials of Congressman Harold Ford, which exculpate Mr. Schledwitz on a number of specific questions. Finally, the government asserts that it informed Mr. Schledwitz of exculpatory statements made by Jake Butcher with regard to the Ford trials.

The Court agrees that the prosecution need not disclose allegedly exculpatory statements which are readily available

to the diligent defender. However, it notes that, in this case, the government incorrectly advised the Court and the defense that there were no such statements. Moreover, if the exculpatory evidence was in the form of grand jury testimony, it was not readily available to the defense. Since the statements in question have never been produced, it is hard to assess whether or not they are material and whether or not they would have affected the outcome of the trial.

Accordingly, the United States is hereby ORDERED to produce, within ten (10) days from the date on this Order, all relevant exculpatory statements made by Jake Butcher, C.H. Butcher, Jr., and anyone else known to the government whose statements were not previously disclosed in this (not the *Ford*) case.

ENTER:

THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

[Filed: Nov. 1, 1994]

UNITED STATES OF AMERICA	)	
	)	
v.	)	NO. CR-1-92-13
	)	
KARL A. SCHLEDWITZ	)	

ORDER

This was a criminal case in which defendant Karl A. Schledwitz was convicted on three counts of mail fraud and his conviction was upheld by the United States Court of Appeals for the Sixth Circuit. The case is back before the Court on Mr. Schledwitz's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. [Doc. 159]. Mr. Schledwitz claims to have discovered the existence of exculpatory statements in the government's possession which were not disclosed to him prior to his trial.

In an Order of September 22, 1994, the Court ordered the government to produce all relevant exculpatory statements made by Jack Butcher, C.H. Butcher, Jr. and anyone else known to the government whose statements had not previously been disclosed in this (not the *Ford*) case.

The government insists that there are no exculpatory statements other than those it has already provided in its initial response to the pending motion.[1] Nevertheless, it has

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[1] These affidavits apparently were procured by counsel for Mr. Schledwitz and given to the government during the course of negotiations relating to this case. While the government admits

submitted relevant portions of C. H. Butcher, Jr.'s grand jury testimony, under seal, for the Court's examination.

The Court has examined the Butcher affidavits and the transcripts of the grand jury testimony. There is no question that the affidavits were readily available to the defense and do not justify a new trial. C.H. Butcher, Jr.'s grand jury testimony is clearly *in*culpatory in nature and would only have been discoverable by the defense if Mr. Butcher had been called as a witness at trial. There is nothing in the evidence now before the Court to suggest that Mr. Schledwitz is entitled to a new trial.

However, one aspect of Mr. Schledwitz's motion for a new trial has not been squarely addressed by the government. The Court notes that Mr. Schledwitz's motion was supported by the affidavit of attorney William T. Ramsey who recollects an interview of his client, Jacob Butcher, by the Federal Bureau of Investigation made in late 1989. Mr. Ramsey remembers that Mr. Butcher made many exculpatory statements about Mr. Schledwitz which were relevant to the matters tried in this case. The transcript of this interview has not been produced in connection with this case either prior to trial, as it apparently should have been, or in response to the Court's Order of September 22, 1994. However, it may have been produced as *Jencks* material in the *Ford* case in the Western District. Obviously, if it *was* produced in that trial, Mr. Schledwitz cannot be said to have been prejudiced by the government's failure to disclose it a second time. If it has never been produced, it should be produced within ten (10) days from the date on this Order.

Accordingly, the Court will withhold any ruling an the motion for a new trial until after the government has

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that it did not give them back to the defense prior to trial, Mr. Schledwitz had every reason to know of their existence.

produced a transcript of the FBI's interview with Jacob Butcher recalled by attorney William T. Ramsey.

ENTER:

THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

[Filed: Nov. 18, 1994]

UNITED STATES OF AMERICA	)	
v.	)	NO. CR-1-92-13
KARL A. SCHLEDWITZ	)	

ORDER

This was a criminal case in which defendant Karl A. Schledwitz was convicted on three counts of mail fraud and his conviction was upheld by the United States Court of Appeals for the Sixth Circuit. The case is back before the Court on Mr. Schledwitz's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. [Doc. 159]. Mr. Schledwitz claims to have discovered the existence of exculpatory statements in the government's possession which were not disclosed to him prior to his trial.

In an Order of November 1, 1994, the Court advised the defendant that it had read "relevant portions" of C.H. Butcher, Jr.'s grand jury testimony and found that it contained no exculpatory information that would entitled Mr. Schledwitz to a new trial.

The defendant is not satisfied with that ruling because he suspects that the United States did not produce the entire record of Mr. Butcher's two grand jury testimonies and he wants the opportunity to assist the Court in finding exculpatory material. He has moved for certain modifications of the Order of November 1, 1994. [Doc. 167].

The Court has checked the documents and found that they are complete transcripts of two different appearances before the Grand Jury. However, counsel for Mr. Schledwitz, John T. Milburn Rogers and/or Jerry W. Laughlin, are hereby GRANTED leave to examine the two documents in the Clerk's office to satisfy themselves that nothing has been withheld. These documents may not be removed from the Courthouse, copied or quoted and information gathered from reading them may be used solely for the purposes of supporting the instant motion for a new trial.

In the Order of November 1, the Court also ordered the government to produce the transcript of an interview of Jacob Butcher made by agents of the Federal Bureau of investigation if it had not already been produced during the *Ford* trial. United States Attorney Gary S. Humble has responded, by affidavit, that a memorandum of Jake Butcher's prison camp interview was provided to the defense during the 1990 *Ford* trial.

However, two attorneys and a paralegal from the defense team in the *Ford* case disagree. They also say that the interview recalled by attorney William T. Ramsey was made by special agents of the I.R.S. not the F.B.I.

Accordingly, the Court's Order of November 1, 1994, is hereby MODIFIED to required that, within ten (10) days of the date on this Order, the government produce any transcript or report it may have of *any* interview (by the IRS, FBI or other government agency) of Jacob Butcher that could possibly be the one recalled by attorney Ramsey.

Mr. Schledwitz may have until Tuesday December 20, 1994, in which to show the Court anything he has found that could justify a new trial of his case.

ENTER:

THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

[Filed: Jan. 31, 1995]

UNITED STATES OF AMERICAN	)	
	)	
v.	)	NO. CR-1-92-13
	)	
KARL A. SCHLEDWITZ	)	

ORDER

Pursuant to a memorandum this day passed to the Clerk for filing, Karl A. Schledwitz's motions for a new trial [Doc. 160] is hereby **DENIED.**

ENTER:

THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

UNITED STATES OF AMERICA	)	
	)	NO. CR-1-92-13
v.	)	
KARL A. SCHLEDWITZ	)	

MEMORANDUM

This was a criminal case in which defendant Karl A. Schledwitz was convicted on three counts of mail fraud. His conviction has been upheld by the United States Court of Appeals for the Sixth Circuit. The case is back before the Court on Mr. Schledwitz's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedures. [Doc. 160]. He claims to have discovered the existence of exculpatory statements in the government's possession which were not disclosed to him prior to or during his trial.

Motions for a new trial based on newly discovered evidence are disfavored. *United States* v. *O'Dell*, 805 F.2d 637 (6th Cir. 1986). Before a new trial will be granted, the movant must establish 1) that the new evidence was discovered after trial; 2) that the evidence could not have been discovered earlier with due diligence; 3) that the evidence is material and not merely cumulative or impeaching; and 4) that the evidence would likely produce an acquittal. *O'Dell* at 640.

The new evidence at issue in this motion is an FBI 302 record of an interview of Jacob F. (Jake) Butcher made by FBI and IRS agents at the Federal Prison Camp in Atlanta, Georgia on October 29, 1985. There appears to be no dispute that the United States failed to produce this document and that it should have done so. United States Attorney Gary

S. Humble claims, by affidavit, that a memorandum of Jake Butcher's prison camp interview *was* provided to the defense team as *Jencks* material during the 1990 *Ford* trial (in which Mr. Schledwitz was a co-defendant). Two attorneys and a paralegal from the defense team in the *Ford* case disagree and, for the purpose of this motion, the Court will assume that the document was never produced.

Jake Butcher was the director and chairman of the board of various banks which defendant Schledwitz has been convicted of helping him defraud. The indictment contends, among other things, that Jake Butcher and his brother C.H. Butcher, for their own personal gain and in order to defraud their own banks, made "nominee" bank loans to Mr. Schledwitz which he would not be held personally responsible for repaying and that, in exchange for his willingness to be a "player" in this scheme, Mr. Schledwitz received business opportunities and approximately 90% of his legal business from the Butchers. A significant part of the proof in the trial of this case showed that, on August 5, 1981, at a time when he was financially incapable of doing so, Mr. Schledwitz "borrowed" $300,000.00 from the United American Bank in Chattanooga in order to buy stock in the United American Bank in Knoxville.

The FBI 302 report in question does touch on the $300,000.00 loan and the government's claim that the Butchers channelled legal business to Mr. Schledwitz. It reveals that Mr. Butcher told the agents he had approached Karl Schledwitz, because he was a friend, to see if he wanted to buy some UAB stock that other friends of his wanted to sell. He was trying to get people to purchase the stock to "keep the market for it." He probably helped 100 people obtain loans for the purchase stock. Although he often arranged for the financing of the purchases of UAB stock, he could not remember, specifically, whether he arranged of any financing for Karl Schledwitz to buy stock. He could not remember whether or not Mr. Schledwitz was holding the

stock for any particular person but he said that Mr. Schledwitz did not hold the stock as a trustee for him and was not obligated to give him (Jake) the proxy vote on the stock. Jake Butcher told the agents that he did not tell Schledwitz that he would take care of the interest payments on the loans. He also denied having ever directed people to Mr. Schledwitz's legal business.

Nothing in this evidence directly contradicts any testimony offered at the trial. Mr. Jesse Barr testified that it was he who handled the interest payments on the loans. There was no proof offered about funneling legal business to Mr. Schledwitz. And, while Mr. Butcher's statements are favorable to Mr. Schledwitz in that they suggest that there was nothing wrong with the loan, this testimony can hardly come as a surprise to Mr. Schledwitz. Mr. Butcher was well known to be friendly and available as a witness and both Jake and C.H. Butcher were known to have testified that there was nothing illegal about Mr. Schledwitz's role in their banking maneuvers. In fact, it does not appear from the affidavits of the defense team that, had they known of this interview, they would have called Mr. Butcher as a witness. The best argument they can make is that it would have been useful for cross-examination of the government's only expert witness, IRS agent J. Alan Horne, who was present during the October 29, 1985 interview of Mr. Butcher at the Atlanta prison. In their joint affidavit in support of Mr. Schledwitz's motion for a new trial, Bobby Lee Cook and W. Thomas Dillard, the attorneys who represented Mr. Schledwitz at trial, state,

> Had we known prior to the trial of the contents of Mr. Butcher's statements to the government, we would have changed the defense trial strategy. We believe that the change in strategy would have lead to an acquittal. For example, Agent J. Alan Horne of the Internal Revenue Service was the government's expert witness at the trial. He participated in the interview of Jake Butcher who told

> Mr. Horne that Mr. Schledwitz was not a nominee. Mr. Horne testified as an expert witness. As such, he could have been cross-examined under Federal Rules of Evidence 702 concerning the facts of Mr. Butcher's statement to him and it would have been brought out that Mr. Butcher did not consider Mr. Schledwitz to have been a nominee.

The Court cannot help noting that these attorneys do not suggest that Agent Horne testified falsely and that, with this statement they could have impeached him. All they claim is that, through his testimony, they could have brought it to the jury's attention that Jake Butcher did not consider the $300,000.00 loan a "nominee" loan or that Mr. Schledwitz was a "player" in his scheme. While this is true, they could have brought Mr. Butcher's opinion to the jury's attention by calling him as a witness. Both the Butcher brothers were known to be friendly and available as witnesses for Mr. Schledwitz. However, even if they had been called, their testimony would have been merely cumulative to that of Jesse Barr.

Applying the *O'Dell* factors to the facts of this case, the Court finds that the evidence was discovered after trial; that Mr. Butcher's opinion, if not the existence of the FBI 302 report, could have been discovered prior to trial with due diligence; that the evidence, although relevant, is merely cumulative and would not have impeached a government witness; and that it is unlikely that, if the jury had known that Jake Butcher did not consider Mr. Schledwitz a "nominee," they would have acquitted him.

Accordingly, the motion for a new trial will be DENIED.

ENTER:

THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

[Filed: Feb. 23, 1995]

UNITED STATES OF AMERICA	)	
	)	NO. CR-1-92-13
v.	)	
KARL A. SCHLEDWITZ	)	

ORDER

In an Order of January 31, 1995, this Court denied defendant Karl A. Schledwitz's motion for a new trial. The case is back before the Court on Mr. Schledwitz's motion to reconsider. Mr. Schledwitz moved for a new trial, pursuant to Rule 33, Federal Rules of Criminal Procedure, on the basis of newly-discovered exculpatory statements in the government's possession which had not been disclosed to him prior to or during his trial. Following the factors outlined in *United States* v. *O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986), the Court found that the evidence was discovered after trial; that Mr. Butcher's opinion, if not the existence of the FBI 302 report, could have been discovered prior to trial with due diligence; that the evidence, although relevant, was merely cumulative and would not have impeached a government witness; and that it was unlikely that, if the jury had known that Jake Butcher did not consider Mr. Schledwitz a "nominee," they would have acquitted him.

Although Mr. Schledwitz comes back with additional information which suggests that, even with due diligence on the part of his attorneys, the existence of the FBI 302 report could not have been discovered prior to trial, this does not

alter the Court's opinion that a new trial is not warranted in this case.

Accordingly, the motion to reconsider is hereby DENIED.

ENTER:

THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

APPENDIX H

Nos. 95-5309/5409

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: Mar. 18, 1996]

UNITED STATES OF AMERICA	)	
Plaintiff-Appellee,	)	ORDER
v.	)	
KARL A. SCHLEDWITZ	)	
Defendant-Appellant.	)	

BEFORE: CONTIE, MILBURN, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Chief Judge Gilbert S. Merritt filed a separate dissent.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Nos. 95-5309/5409

UNITED STATES v. SCHLEDWITZ

MERRITT, Chief Circuit Judge, dissenting. I respectfully dissent from the order of the Court declining to grant en banc review in this case. This is a serious case of unconstitutional prosecutorial misconduct involving an obvious *Brady* violation. Generated in a political atmosphere that included an earlier indictment and acquittal of the defendant along with Democratic Congressman Harold Ford of Memphis, the case is a mail fraud prosecution against a member of the former Jake Butcher Democratic political organization in Tennessee. Politics pervades the case. The Republican prosecutors alleged that the defendant, a young Memphis lawyer and aspiring Democratic politician, was Butcher's agent or "nominee" in purchases of stock in Butcher's banks, purchases allegedly designed to manipulate the price of the stock. The indictment asserts that defendant made fraudulent loans from Butcher's bank to effectuate the stock purchases.

The prosecutors did not disclose, and the defendant did not know, that the FBI and the IRS had a thirteen-page 302 statement from Butcher taken seven years before the 1992 trial. As the panel opinion suggests, the statement specifically and expressly exonerated the defendant of acting as Butcher's agent in those transactions. If believed, the statement would acquit the defendant of fraud and bad faith.

The panel decision of our court does not make the connection between the 302 statement and the question of calling Butcher to the stand. It simply says:

> Clearly, defendant's counsel could have called Jake Butcher to the stand at the trial to elicit his favorable statements, but they chose not to do so. Since defendant should have been aware of Butcher's opinions, the failure to provide defendant with the FBI 302 report is not a

denial of a fair trial with regard to Butcher's substantive comments.

Although it is true that the defendant knew that Butcher could possibly be helpful as a witness if called, the defendant's counsel were evidently afraid that without a prior written statement with which to examine Butcher, Butcher would probably cave in to government pressure and testify falsely against their client or give equivocal testimony. They did not call Butcher to the stand because Butcher, who was then in federal custody, declined to testify voluntarily because of fear of governmental retaliation concerning his parole. Butcher asserted forcefully that he did not want to testify. In the absence of a prior statement, counsel would be defenseless if Butcher turned against the defendant or gave equivocal testimony. Thus, the existence of the unknown, exculpatory 302 statement, defendant asserts, was significant.

The panel describes the exculpatory 302 statement withheld by the prosecutors as follows:

> The FBI 302 report reveals that Butcher told the agents that he had approached Schledwitz as a friend to offer him some bank stock that some of Butcher's other friends wanted to sell. Although Butcher admitted that he frequently assisted others in financing purchases of stock from his bank, Butcher could not remember whether he arranged financing for Schledwitz. The report further shows that Butcher stated that Schledwitz did not hold bank stock as a "trustee" [*i.e.*, agent or nominee] for him, that he never told Schledwitz he would take care of interest payments on a loan, and that he never directed people to Schledwitz's law practice.

The panel opinion acknowledges that the prosecution's misconduct represented a serious *Brady* violation and that Judge Hull below had clearly erred. Although reputable trial counsel swore in a plausible affidavit that knowledge of the existence of the prior 302 statement would have changed their

entire trial strategy (J.A. 283), the panel held that the 302 statement was not "material" under *Brady* because "there is no reasonable probability that the outcome of the trial would have been different." (Op. p. 13.)

The panel's argument that "defendant should have been aware of Butcher's opinion" even without the 302 statement (op. p. 12) is misplaced in these circumstances because it is the availability of the statement itself to use in examination of Butcher that is the key. There is no more effective tool of examination than a prior written statement in such circumstances. This could have made a significant difference in trial strategy. Had the statement been available, the defense might have called Butcher and put the defendant on the stand rather than follow the unsuccessful strategy adopted in the absence of knowledge of the statement.

There is one other important point concerning the materiality of the 302 report. The report not only contained extensive exculpatory statements made by Butcher in reference to defendant, but also revealed that IRS Agent Jay Horne was present at the Butcher interview. At trial Horne was the prosecution's only expert witness. He was presented in a false light by the prosecution as a neutral advisor who had been hired by the government to trace the defendant's financial records. No mention was ever made by the prosecution of Horne's role in the investigation of defendant in 1985. The District Court denied the defendant's motion for a new trial, incorrectly applying the four-part test, articulated in *United States* v. *O'Dell*, 805 F.2d 635, 640 (6th Cir. 1986), for new trial motions based on newly discovered evidence. The District Court erred in failing to recognize that a different test is required when the new trial motion is based on evidence specifically requested by the defendant but knowingly withheld by the prosecution. The higher standard, first articulated in *United States* v. *Bagley*, 473 U.S. 667 (1985), and refined just last year in *Kyles* v. *Whitley*, 115 S.

Ct. 1555 (1985), requires a new trial when undisclosed evidence is "material";

> *A showing of materiality does not require a demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . . Bagley's* touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as *a trial resulting in a verdict worthy of confidence.* A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles v. *Whitley*, 115 S. Ct. at 1566 (citations omitted and emphasis added).

The panel opinion does not adequately consider the value of the 302 report would have served at trial as the vehicle for defendant to impeach the government's sole expert witness, Jay Horne. Defendant reasonably contends that evidence of Horne's presence at the 1985 Butcher interview, a fact unknown to defendant at trial, could have been used by defendant to debunk the false appearance created for the jury that Horne was a disinterested expert hired by the government to review defendant's financial records. Horne could have been shown to have at one time personally investigated the defendant for the IRS.

The panel, while recognizing that impeachment evidence can constitute *Brady* material, concluded without explanation that

> this type of impeachment does not satisfy the *Bagley* materiality standard and, therefore, does not require the granting of defendant's motion for a new trial. The

> absence of this "impeaching" evidence from the trial does not "undermine confidence in the outcome of the trial" and does not "deprive the defendant of a fair trial."

Panel Op. at 13. Such a cursory dismissal of defendant's due process rights is error. If, as the above language suggests, the panel meant that this general category of impeachment evidence could never be "material" under *Kyles*, then the panel is simply wrong. *See Kyles*, 115 S. Ct. at 1565 (disallowing any difference between exculpatory and impeachment evidence for *Brady* purposes). If the panel instead only meant that this particular impeachment evidence is not material in this particular case, then the court is also simply wrong. It seems self-evidence that the government's use of Horne as an independent neutral expert created a false impression that would likely affect the jury's view of Horne's testimony, and, if so, would undermine confidence in the outcome of the trial.

The case against the defendant and Congressman Harold Ford, arising out of Butcher bank loans, was tried separately in West Tennessee. It was an extremely weak case, and finally after an earlier hung jury it resulted in an acquittal in Jackson, Tennessee. Likewise, in this case tried in upper East Tennessee, Judge Hull first dismissed the indictment but then reinstated it. He then threw out five out of the eight counts at the end of the government's case and at one point indicated that the case was so weak that he might dismiss the entire case for lack of evidence. Thus, we are not dealing with a strong case that one could have confidence would have resulted in a conviction in the absence of these due process problems.

The court is too deferential to the government and not sufficiently concerned about protecting the rights of the accused. If this *Brady* violation is immaterial and does not make any difference, when will such a violation make a difference? The panel decision unfortunately sends a message to prosecutors that they can engage in serious ethical and

constitutional lapses in violation of *Brady* and *Kyles* with impunity. We should not permit that message to go out, particularly in a case like this where the appearance of partisan political motivation by the prosecution exists. Politics and political statements and charges pervaded the government's case from the opening statement until the end. In such a situation, the government should be held accountable for its obvious misconduct, and a new trial should be granted.

APPENDIX I

Nos. 95-5309/5409

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: Mar. 27, 1996]

UNITED STATES OF AMERICA	)	
Plaintiff-Appellee,	)	
v.	)	AMENDED ORDER
KARL A. SCHLEDWITZ	)	
Defendant-Appellant.	)	

BEFORE: CONTIE, MILBURN, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Chief Judge Merritt filed a separate dissent in which Judge Martin joined.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX J

Nos. 95-5309/5409

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: June 4, 1996]

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	ORDER
KARL A. SCHLEDWITZ,	)	
Defendant-Appellant.	)	

Before: MERRITT, Chief Circuit Judge.

Counsel for the defendant has moved for publication of the opinion I filed objecting to the Court's refusal to grant en banc review of the panel decision in the instant case. That motion is granted, and that dissenting opinion should be forwarded by the Clerk of the Court for publication in both the print and electronic reporting systems. The panel decision in this case with which I disagree has been published on Westlaw, but the panel chose not to report its opinion in the West Reporter System.

Accordingly, it is so ORDERED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Supreme Court, U.S.
FILED
JUL 12 1996
CLERK

No. 95-2034

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

KARL A. SCHLEDWITZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 9,000 attorneys and 30,000 affiliate members, including representatives from every state. The American Bar Association awards NACDL full representation in its House of Delegates. NACDL was founded in 1958 to ensure justice and due process for persons accused of crime; to foster the integrity, independence and expertise of

[1] All parties have consented in writing to the filing of this brief pursuant to Rule 37.3 of the Rules of this Court.

the criminal defense profession; and to promote the proper and fair administration of criminal justice.

The criminal defense attorneys who comprise the NACDL have long been dissatisfied with the restrictive rules governing federal criminal discovery and the criminal discovery rules of most states, many of which provide even less opportunity for pretrial discovery than the federal system. Because of the extremely limited scope of criminal discovery, this Court's constitutional decisions regarding the scope of the government's *Brady* obligations are exceptionally important to the fair operation of the criminal justice system. Nothing could be more pernicious than the rule adopted by the Sixth Circuit, which encourages prosecutors to disregard their *Brady* obligations whenever *in their view* the defendant is capable of discovering similar exculpatory information on his own.

REASONS FOR GRANTING THE PETITION

This Court is well aware of the restricted scope of federal criminal discovery. *See Degen v. United States*, 116 S.Ct. 1777, 1996 U.S. LEXIS 3719, *11 (1996). The Court may not know that in many states a defendant's right to criminal discovery is even more limited. In Virginia, for example, there is no equivalent of the Jencks Act and a primitive trial by ambush is the state sanctioned norm. In states where there is virtually no criminal discovery, the *Brady* rule assumes a still more important function than in federal cases since it often provides the only real basis for discovery of material exculpatory evidence.

The "due diligence" exception to *Brady* adopted by the Sixth Circuit and some other courts seriously undermines the effectiveness of the *Brady* rule and is plainly at odds with its purpose. It is no exaggeration to say that the criminal justice system cannot function properly if prosecutors disregard their obligations under *Brady*. Since the "due diligence" exception strongly encourages prosecutors to do just that, it is vitally

important that this Court make clear that a prosecutor's speculation about a defendant's supposed ability to discovery exculpatory information with his own resources is no excuse for the prosecution's failure to disclose that information upon request by the defense -- even if a court later agrees with the prosecutor's view of the defendant's capabilities.

It is common knowledge that prosecutors often fail to comply fully -- or comply at all -- with their *Brady* obligations and that they usually get away with it.[2] And when *Brady* violations do come to light prosecutors are almost never disciplined, even for egregious misconduct. After reciting several then-recent instances of blatant *Brady* violations in federal cases, Reid Weingarten, the Chairman of the White Collar Crime Committee of the ABA's Criminal Justice Section, observed that

> at some point in the last decade, the insidious and dangerous notion that corners can be cut by the

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[2] "Difficult as it is to enforce the *Brady* rule in the pretrial discovery and trial phases of a case, it is even more difficult to find and then exploit suppressed exculpatory evidence during the post-conviction phase of criminal litigation." Harvey A. Silvergate, *Admitting Error in Brady Cases*, Criminal Law Advocacy Reporter 259 (1993). Mr. Silvergate observes that "once a prosecutor has taken the step of withholding exculpatory evidence at trial, he or she can hardly be expected to suddenly comply with post-verdict requests for disclosure. . ." *Ibid.* In most jurisdictions, the same prosecutor who tried the case is responsible for responding to post-conviction attacks, thereby enabling him to continue to conceal exculpatory evidence. Some trial judges are also "hesitant to admit that a trial over which he or she presided might have resulted in a due process violation, or that a defendant whom the judge grew to believe committed a heinous crime and whom he may have sentenced to life imprisonment or even death, may in fact be innocent." *Id.* at 260. *See also United States v. Bagley*, 473 U.S. 667, 702 (1985) (Marshall, J., dissenting) ("The reviewing court, faced with a verdict of guilty, evidence to support that verdict, and pressures, again understandable, to finalize criminal judgments, is in little better position to review the withheld evidence than the prosecutor.").

> government to catch and convict big criminals seeped into many United States Attorneys' Offices. This notion was fueled by Supreme Court decisions denying "undeserved" windfalls to defendants for prosecutorial misconduct and basically removing judicial supervision from the grand jury process. I believe these decisions emboldened prosecutors to become more aggressive. The prospect of an OPR or Bar referral somewhere down the road is not an effective deterrent to a (over) zealous prosecutor who, in the heat of battle, concludes that disclosure of "arguable" *Brady* material will kill his case and allow the "guilty" to go free.
>
> * * *
>
> The cure will come when trial judges have the tools and the will to come down on prosecutors who violate the rules.[3]

Judges and members of Congress have repeatedly voiced their frustration and dismay at the Department of Justice's failure to discipline prosecutors who engage in misconduct. For example, in 1990 the House Committee on Government Operations attempted to track ten then-recent cases in which federal courts found there was serious prosecutorial misconduct to determine whether DOJ took any disciplinary action. After stonewalling for more than five months, the DOJ informed the Committee that five of the ten cases were "administratively determined not to involve conduct sufficiently serious to warrant disciplinary action, and were not referred" to the Office of Professional Responsibility (OPR). Of the five cases that were referred to OPR, three were determined not to warrant disciplinary action and two remained

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[3] "Chairman's Corner," White Collar Crime Committee Newsletter (Jan./Feb. 1994).

open in OPR. The DOJ offered no explanation of its reasons for disagreeing with the judicial findings of misconduct.[4]

In 1987 Professor Richard A. Rosen of the University of North Carolina School of Law surveyed the extent to which prosecutors had been sanctioned for suppressing *Brady* material. Since 1963, when *Brady* was decided, Professor Rosen was able to find only nine cases in which bar discipline was *even considered* for a *Brady* violation. The prosecutors received some sanction in approximately half of those nine cases.[5]

In light of all this, the courts must not adopt a rule of law that *encourages* prosecutors to conceal exculpatory information, secure in the knowledge that if their concealment later comes to light they can justify their conduct by arguing that the defendant could have discovered the same exculpatory information if only his attorney had been more diligent.

The standard of materiality this Court has adopted to implement the *Brady* rule allows the prosecutor to be the judge of when potentially exculpatory evidence must be disclosed to the accused. As Justice Marshall convincingly argues in his dissent in *Bagley*,

> the dual role that the prosecutor must play poses a serious obstacle to implementing *Brady*. The prosecutor

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[4] *Federal Prosecutorial Authority in a Changing Legal Environment -- More Attention Required: Hearings Before the House Committee on Governmental Operations*, 101st Cong., 2d Sess. 24-25 (1990). *See also Secret Discipline of Prosecutors Raises Accountability Issues*, Washington Post, January 15, 1993 at A1, A18.

As bad as the situation is with federal prosecutors, it is far worse with state prosecutors who are usually responsible for the most reprehensible *Brady* violations, frequently in capital cases. *See e.g., Banks v. Reynolds*, 54 F.3d 1508, 1510-11 (10th Cir. 1995); *Kyles v. Whitley*, 115 S.Ct. 1555 (1995).

[5] Cris Carmody, *The Brady Rule -- Is It Working?* The National Law Journal, Vol. 15, No. 37 (May 17, 1993) at 30.

> is by trade, if not necessity, a zealous advocate. He is a trained attorney who must aggressively seek convictions in court on behalf of a victimized public. At the same time, as a representative of the state, he must place foremost in his hierarchy of interests the determination of truth. Thus, for purposes of *Brady*, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case. Given this obviously unharmonious role, it is not surprising that these advocates oftentimes overlook or downplay potentially favorable evidence, often in cases in which there is no doubt that the failure to disclose was a result of absolute good faith. Indeed, one need only think of the Fourth Amendment's requirement of a neutral intermediary, who tests the strength of the policeman-advocate's facts, to recognize the curious status *Brady* imposes on a prosecutor.

United States v. Bagley, 473 U.S. 667, 696-97 (1985) (Marshall, J., dissenting).

The NACDL is not asking the Court to reconsider *Bagley*. We *are* asking the Court to not give the prosecutor the much more problematic job of deciding when defense counsel can reasonably be expected to discover on his own material exculpatory evidence already in the possession of the prosecution. We can see absolutely no pragmatic reasons that would justify such a rule and many weighty arguments against it. Indeed, the issue seems so clear to us that it is mystifying and extremely troubling that so many lower courts have adopted the Sixth Circuit's position.

A "due diligence" exception to the *Brady* rule is mistaken for all of the reasons argued so cogently in Karl Schledwitz's petition for a writ of certiorari. But there are additional reasons to reject the Sixth Circuit's rule. Requiring a

defendant to exercise "due diligence" to obtain exculpatory information makes the outcome of a criminal case depend to an intolerable degree on the resources a defendant has available to investigate the facts and ferret out exculpatory evidence on his own. Very few defendants have the means to hire even a single investigator and indigent defendants' requests for funds to hire an investigator are routinely denied -- even in federal cases -- regardless of the reasonableness of their request. How then is a defendant supposed to discover the exculpatory evidence on his own? A harried state public defender juggling several hundred felony cases each year has no time to investigate the facts on his own. And even the wealthiest defendant cannot match the unparalleled investigative resources available to a federal prosecutor. The prosecutor also enjoys the luxury of having ample time to investigate. Once indicted, the accused generally has little time to investigate the facts on his own, even assuming he has the financial resources necessary to conduct an adequate investigation.

As Justice Marshall observed in his insightful dissent in *United States v. Bagley*, 473 U.S. 667, 694 (1985):

> Many, perhaps most, criminal defendants in the United States are represented by appointed counsel, who often are paid minimal wages and operate on shoestring budgets. In addition, unlike police, defense counsel generally is not present at the scene of the crime, or at the time of arrest, but instead comes into the case late. Moreover, unlike the government, defense counsel is not in the position to make deals with witnesses to gain evidence. Thus, an inexperienced, unskilled, or unaggressive attorney often is unable to amass the factual support necessary to a reasonable defense. When favorable evidence is in the hands of the prosecutor but not disclosed, the result may well be that the defendant is deprived of a fair chance before the trier of fact,

> and the trier of fact is deprived of the ingredients necessary to a fair decision.

And, as Justice Marshall also noted, *id.* at 667 n.3, the Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), establishing a stringent standard for demonstrating ineffective assistance of counsel, "makes an effective *Brady* right even more crucial. Without a real guarantee of effective counsel, the relative abilities of the state and the defendant become even more skewed, and the need for a minimal guarantee of access to potentially favorable information becomes significantly greater."

In short, the basic premise of the "due diligence" exception -- that a defendant exercising due diligence has the ability to discover the exculpatory information concealed by the prosecutor -- is a fantasy. But, even if he does, why should his fate be made to depend on the diligence of his attorney in investigating the facts? "Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of the truth, the government simply cannot avoid responsibility" by placing the burden of discovering the exculpatory evidence on the defendant. *Kyles v. Whitley*, 115 S.Ct. 1555, 1568 (1995). The prosecutor is the representative of a sovereign whose interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Requiring the prosecutor to disclose material exculpatory evidence in the government's possession "will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles v. Whitley*, 115 S.Ct. at 1568.

Significantly, the rule advocated here will make a difference only where the defendant is *not* actually aware of the exculpatory evidence withheld by the prosecution. If the defendant is aware of the evidence, the prosecutor's failure to dis-

close it will be treated as non-material. *See Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995).

The "due diligence" cases are also fundamentally incorrect because the exculpatory information withheld from the defendant by the prosecution can, in most instances, never be duplicated by the defense no matter how well-endowed with resources and diligent the defense attorney is. As in this case, the exculpatory information is often contained in a report of an interview prepared by a federal agent or a police officer. Even if the diligent defense attorney interviews the same witness whose prior interview by a law enforcement officer is memorialized in the withheld report, what the defense attorney learns from his own interview cannot possibly substitute for the withheld FD 302 or police report. First, it would be a rare case in which the defense attorney learned substantially all of the same factual information and opinions contained in the FD 302. He may not ask precisely the same questions the FBI agent did. Because the defense attorney will typically not know as much about the facts of the case as the FBI agent, his questions will usually not be as penetrating and far-ranging as the agent's.

Even if he does ask the right questions, he may not get the same answers as the FBI agent for a variety of reasons. The agent will often have interviewed the witness long before the defense attorney, when the facts are still fresh in the witness's mind.[6] The witness may lie to the defense attorney

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[6] In this case the FBI/IRS interview of Jake Butcher took place in 1985 whereas petitioner Schledwitz was indicted in 1992, seven years later. The court of appeals surmised that petitioner could have learned, by interviewing Butcher in 1992, the same things Butcher told the government in 1985. However, Butcher himself swore that he spent the seven years between 1985 and 1992 "trying to erase the memory of the events leading to [his] incarceration." He added that by 1992 he could not recall any of the questions he had been asked by the government during the

(continued)

with impunity but making a false statement to a federal agent is a felony under 18 U.S.C. §1001. The witness may not mention the exculpatory facts to the defense attorney because he does not wish to be called as a defense witness. He may also not wish to be called as a government witness so he attempts to avoid that by telling the agent the exculpatory information.

Even assuming that the defense attorney is lucky enough to ask the same questions and obtain the same answers from the witness, the information is still not nearly as valuable to the defense as the FD 302 report because the 302 report locks the witness in to that version of the facts while the attorney's interview notes do not. If the witness testifies to facts different than those contained in the 302 he can be effectively impeached with the report. If the witness denies telling the FBI agent what is reported in the 302, the FBI agent can be called by the defense to contradict the witness. The agent plainly has no motive to invent statements of the witness *exculpating* the defendant.

A defense attorney attempting to impeach a witness who testifies to something at odds with what the witness told the attorney before trial is in a very different situation. It is improper for the attorney to ask "didn't you tell me" type questions which place the attorney's credibility at issue. Without

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(Fn.6,continued)
1985 interview. Butcher explained that he had grown "extremely paranoid, fearful of governmental reprisal and unsure of [him]self." His aim, in 1992, was to convince defense counsel that he would be a poor witness so that he would be left alone. C.A. App. 355-356; Pet. 15. Butcher succeeded in dissuading petitioner from calling him as a witness. Had petitioner been given the FD 302 report of Butcher's 1985 interview he surely would have been called on to testify in behalf of petitioner.

another witness to the interview the attorney cannot impeach the witness's trial testimony at all. (Despite that, judges regularly deny indigent defendants' requests for funds to pay an investigator and tell the defense attorney that he should do the factual investigation himself.) Even if the attorney had an investigator with him during the interview or the interview was done solely by the investigator, the investigator's impeachment of the witness's false testimony cannot possibly be as effective as impeachment through use of the FD 302 and/or the testimony of an FBI agent. The private investigator works for the attorney and the defendant and therefore has a motive to shade his testimony in favor of the defendant. Moreover, few private investigators make as good an impression on the jury as an FBI agent and their written summaries of interviews are rarely as thorough as the FD 302.

Finally, the "due diligence" rule is objectionable because it invites sterile, subjective arguments about what can be expected of a reasonably diligent defense counsel when the inquiry ought to focus solely on the exculpatory nature of the suppressed evidence. *See e.g.*, *Barnes v. Thompson*, 58 F.3d 971, 976-77 (4th Cir. 1995); *id.* at 984-85 (Murnaghan, J., concurring in the judgment).

The Court is not likely to find a much better set of facts raising this important *Brady* issue than those in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JULY 1996

(3)

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No. 95-2034

In the Supreme Court of the United States

OCTOBER TERM, 1995

KARL A. SCHLEDWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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2 2 PP

QUESTION PRESENTED

Whether the government's failure to disclose an FBI report of an interview with an unindicted co-conspirator entitled petitioner to a new trial under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-2034

KARL A. SCHLEDWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is unpublished, but the judgment is noted at 72 F.3d 130 (Table). An opinion dissenting from the denial of rehearing en banc (Pet. App. 37a-42a) is reported at 86 F.3d 73. The opinions of the district court (Pet. App. 29a-33a, 34a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1995. A petition for rehearing was denied on March 18, 1996. Pet. App. 36a. The petition for a writ of certiorari was filed on June 17, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341 and 1342. He was sentenced to six months' confinement in a halfway house. The court of appeals affirmed. Pet. App. 13a-20a. Petitioner subsequently moved for a new trial pursuant to Federal Rule of Criminal Procedure 33, arguing that the government had failed to disclose a report of an FBI interview in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). The district court denied petitioner's motion for a new trial, Pet. App. 29a-33a, and denied his motion for reconsideration, *id.* at 34a-35a. The court of appeals affirmed. *Id.* at 1a-12a.

1. The charges of which petitioner was convicted stemmed from loans made to him by various banks owned or controlled by Jacob (Jake) F. Butcher and his brother, C.H. Butcher, Jr. Counts One through Three of the indictment alleged that petitioner received more than $1 million in loans between 1979 and 1982, although his income during that period was insufficient to justify the loan amounts.[1] The proceeds of the loans were largely used for the personal benefit of the Butchers, and petitioner therefore was a mere "nominee" on the loans. Petitioner was not

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[1] Petitioner was convicted on Counts One through Three of the indictment, all of which charged a scheme to defraud banks controlled by the Butchers. C.A. App. 14-21. Counts Four through Eight alleged a scheme on petitioner's part to defraud the successors in interest to the failed Butcher banks. *Id.* at 21-25. The district court dismissed Counts Four through Eight at trial, on the ground that there was no evidence that petitioner could have repaid any more money than he did to the successors in interest. Pet. App. 2a.

personally responsible for repaying the loans, but instead used further loans from Butcher-controlled institutions to cover the interest payments. In return for being a "player" in the Butcher organization, petitioner, a lawyer, was entitled to keep some of the loan proceeds and received legal work from the Butchers. Pet. App. 13a-14a; C.A. App. 14-16. In total, petitioner borrowed more than $1.5 million between 1979 and 1982, in which years petitioner had annual income of $34,313, $28,385, $31,994, and $52,163, respectively. Pet. App. 14a & n.1.

In proving Count One of the indictment,[2] the government established that in 1979, petitioner "borrowed" approximately $450,000 from banks controlled by Jake Butcher. Petitioner's income in 1979 was $34,313; in the preceding year, his income was $13,293. Pet. App. 3a, 14a n.1. The proceeds of those loans were used to purchase stock in United American Bank (UAB) of Knoxville—a bank controlled by Jake Butcher. Jesse Barr, a close associate and self-described "alter ego" of Jake Butcher's (C.A. App. 431), testified that Jake had asked petitioner to buy the UAB stock because Butcher wanted to maintain the price of the stock by creating a market for it. Barr also testified that he had "handled" petitioner's stock loan at Butcher's request. *Id.* at 449-450, 452. Barr testified, however, that nothing about the stock transaction was illegal and that he did not believe peti-

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[2] Only Count One is discussed in detail, because the exculpatory statements that petitioner contends were not disclosed concern only the fraudulent transaction alleged in that count.

tioner had ever committed any crimes. *Id.* at 481, 491. Neither of the Butcher brothers testified at trial.[3]

2. On August 17, 1994, after his conviction had been affirmed on appeal (Pet. App. 13a-20a), petitioner moved for a new trial pursuant to Federal Rule of Criminal Procedure 33. Petitioner asserted that the government had improperly failed to disclose information concerning exculpatory statements made by Jake Butcher during an interview with agents of the Federal Bureau of Investigation (FBI). Pet. App. 4a-5a. The government maintained that it had disclosed the FBI report of the Jake Butcher interview in petitioner's 1990 prosecution in the Western District of Tennessee. *Id.* at 5a. Petitioner's attorneys from the earlier trial provided affidavits denying any knowledge of such an interview. *Id.* at 5a, 31a. For purposes of petitioner's motion for a new trial, the district court assumed that the interview report (known as an "FBI 302" or "302") had never been disclosed to petitioner. *Ibid.*

The government then produced an FBI 302 report memorializing an interview conducted with Jake

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[3] The fraudulent scheme charged in Counts Two and Three of the indictment concerned transactions with banks controlled by C.H. Butcher, Jr. The government alleged and proved that petitioner had received a series of loans from C.H. Butcher's banks, and that petitioner had used part of the proceeds of those loans to pay off C.H. Butcher's gambling debt at the Aladdin Hotel and Casino in Las Vegas. C.A. App. 17-18; Horne 7/13/92 Tr. 23-26; Horne 7/15/92 Tr. 1-8; Gov't Exh. 25-28, 60. In addition, the government proved that as part of the overall scheme to defraud, petitioner had "borrowed" $55,810 from UAB of Knoxville, the proceeds of which were used by C.H. Butcher to purchase insurance. C.A. App. 16; Horne 7/13/92 Tr. 17-22; Gov't Exh. 18, 56-59.

Butcher at the Federal Prison Camp in Atlanta, Georgia on October 29, 1985. With respect to the UAB stock transaction, Butcher stated that he had approached petitioner, who was his friend, about the purchase of UAB stock because Butcher wanted people to buy the stock in order to maintain a market for it. C.A. App. 288-289, 291. Butcher could not remember whether he had arranged the financing for petitioner's purchase of the stock, although he had done so for other individuals. He denied that petitioner was holding the stock in trust for him or that petitioner was obligated to give Butcher the proxy vote on the stock. *Id.* at 289, 291. Butcher also stated that he had never told petitioner that interest payments on the stock loan would be made by or through Butcher. *Id.* at 291. Butcher denied having directed other people to petitioner's legal practice, but he stated that petitioner had represented Butcher in some corporate matters. *Id.* at 291, 292.

The FBI 302 also revealed that Special Agent J. Alan Horne of the Internal Revenue Service had been present at the interview of Jake Butcher. C.A. App. 288. Horne, who had since left government service, testified as an expert witness for the government at petitioner's trial. Pet. App. 6a.

In moving for a new trial, petitioner submitted affidavits from his trial counsel explaining how the FBI 302 report could have been used to bolster his defense. See C.A. App. 283-285, 347-348. Trial counsel asserted that Horne "could have been cross-examined * * * concerning the facts of Mr. Butcher's statement to him and it would have been brought out that Mr. Butcher did not consider [petitioner] to have been a nominee." *Id.* at 285. Counsel also stated that the report could have been used to "impeach[] the per-

ceived objectivity of [Horne], the Government's sole expert witness." *Id.* at 348. Finally, counsel suggested that Jake Butcher's attorney, who was present at the interview, might have been called as a defense witness if the 302 report had been disclosed to the defense. *Ibid.* The affidavits did not suggest that Butcher himself would have been called as a witness if counsel had been made aware of the report.

3. The district court denied petitioner's motion for a new trial. Pet. App. 29a-33a. The court applied the standard articulated in *United States* v. *O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986), cert. denied, 484 U.S. 859 (1987), which requires the movant to establish: (1) that the new evidence was discovered after trial; (2) that the evidence could not have been discovered earlier with due diligence; (3) that the evidence is material and not merely cumulative or impeaching; and (4) that the evidence would likely produce an acquittal. Pet. App. 30a. The court explained that

> while Mr. Butcher's statements are favorable to [petitioner] in that they suggest that there was nothing wrong with the loan, this testimony can hardly come as a surprise to [petitioner]. Mr. Butcher was well known to be friendly and available as a witness and both Jake and C.H. Butcher were known to have testified that there was nothing illegal about [petitioner]'s role in their banking maneuvers.

Id. at 32a. The court also noted that "[b]oth the Butcher brothers were known to be friendly and available as witnesses for [petitioner]," and that, "even if they had been called, their testimony would have been merely cumulative to that of Jesse Barr." *Id.* at 33a. The district court subsequently denied

petitioner's motion for reconsideration. *Id.* at 34a-35a.

4. The court of appeals affirmed. Pet. App. 1a-12a. The court first held that the district court had applied an incorrect legal standard in ruling on petitioner's motion for a new trial. When such a motion is based on evidence specifically requested by the defendant and not disclosed by the government, the court of appeals explained, the question is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 8a, quoting *O'Dell*, 805 F.2d at 641 (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring)). Citing *Kyles* v. *Whitley*, 115 S. Ct. 1555 (1995), the court of appeals further explained that *Bagley*'s materiality standard does not require the defendant to show by a preponderance of the evidence that disclosure of the suppressed evidence would likely have resulted in an acquittal, or that the untainted evidence would have been insufficient to sustain a conviction. Pet. App. 9a. Finally, the court noted that the materiality of the undisclosed evidence must be evaluated cumulatively. *Ibid.*

The court of appeals concluded, however, that the undisclosed FBI 302 report was not material. The court explained:

> It can hardly be argued by [petitioner] that the statements made by Butcher meet the *Bagley* materiality test since [petitioner] had to be aware of Butcher's opinion contained in the FBI 302 report. The district court found that "Mr. Butcher was well known to be friendly and available as a witness [and] known to have testified that there was

> nothing illegal about [petitioner's] role in [his] banking maneuvers." Indeed, [petitioner's] counsel interviewed Butcher prior to the trial. Clearly, [petitioner's] counsel could have called Jake Butcher to the stand at the trial to elicit his favorable statements, but they chose not to do so. Since [petitioner] should have been aware of Butcher's opinions, the failure to provide [petitioner] with the FBI 302 report is not a denial of a fair trial with regard to Butcher's substantive comments. See *United States* v. *Todd*, 920 F.2d 399, 405 (6th Cir. 1[9]90) (holding that there is no *Brady* violation when the defendant "was aware of the essential facts that would enable him to take advantage of the exculpatory evidence").

Pet. App. 10a-11a (citation omitted).

The court of appeals then addressed petitioner's contention that the 302 report could have been used to impeach Horne's credibility as an expert witness by demonstrating Horne's prior involvement in the investigation of petitioner. Pet. App. 11a. The court acknowledged that "[w]ithout the FBI 302 report, [petitioner] had no way of knowing of the existence of the 1985 interview with Butcher and Horne's role in it." *Ibid.* The court concluded, however, that "[t]he absence of this 'impeaching evidence' from the trial does not 'undermine[] confidence in the outcome of the trial' and does not 'deprive[] the defendant of a fair trial.'" *Ibid.* (quoting *Bagley*, 473 U.S. at 677). The court therefore affirmed the district court's decision "since, under the correct standard, there is no reasonable probability that the outcome of the trial would have been different." Pet. App. 11a.

5. The court of appeals denied rehearing and rehearing en banc. Pet. App. 36a. Chief Judge Merritt, joined by Judge Martin, filed an opinion dissenting from the denial of rehearing en banc. *Id.* at 37a-42a. The dissenting judges explained:

> Although it is true that [petitioner] knew that Butcher could possibly be helpful as a witness if called, [petitioner's] counsel were evidently afraid that without a prior written statement with which to examine Butcher, Butcher would probably cave in to government pressure and testify falsely against their client or give equivocal testimony. * * * In the absence of a prior statement, counsel would be defenseless if Butcher turned against [petitioner] or gave equivocal testimony.

Id. at 38a. If the 302 report had been available, the dissenting judges surmised, "the defense might have called Butcher and put [petitioner] on the stand rather than follow the unsuccessful strategy adopted in the absence of knowledge of the statement." *Id.* at 39a. The dissenting judges also asserted that "evidence of Horne's presence at the 1985 Butcher interview, a fact unknown to [petitioner] at trial, could have been used by [petitioner] to debunk the false appearance created for the jury that Horne was a disinterested expert hired by the government to review [petitioner's] financial records." *Id.* at 40a.

ARGUMENT

Petitioner contends (Pet. 9-13) that review by this Court is warranted to resolve a conflict among the circuits concerning the scope of the government's disclosure obligations under *Brady*. As we explain below, no circuit conflict exists. Even if a conflict did

exist, moreover, the instant case would be an inappropriate vehicle for resolving it. Petitioner claims that the court of appeals' resolution of this case rested on a determination that petitioner's trial counsel should, in the exercise of due diligence, have acquired additional information relevant to his client's defense. In fact, however, the court of appeals also appears to have concluded that in light of the information that petitioner's trial counsel *actually possessed*, disclosure of the 302 report would not have created a reasonable probability of a different result. We believe that the court of appeals' holding in that respect is correct. In any event, the correctness of that holding turns on the application of an established legal standard to a unique set of facts. This case therefore presents no question warranting this Court's review.

1. In *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." The Court has subsequently explained that "favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles* v. *Whitley*, 115 S. Ct. 1555, 1565 (1995) (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)). This Court's decisions make clear that no *Brady* violation occurs when the government fails to disclose exculpatory evidence that the defense in fact possesses. See *United States* v. *Agurs*, 427 U.S. 97, 103 (1976) (*Brady* governs situations involving "the discovery, after trial, of information which had been

known to the prosecution but unknown to the defense"); *Giles* v. *Maryland*, 386 U.S. 66, 96 (White, J., concurring) (1967) ("[A]ny allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the knowledge held by the defense."). That principle follows from the Court's definition of "materiality": if the defense actually possesses information withheld by the prosecution, there can be no reasonable probability that its disclosure by the government would alter the outcome of the trial.

2. As petitioner correctly notes (see Pet. 10-11), some courts of appeals have also held that the government's non-disclosure of exculpatory evidence does not violate *Brady* when the defendant does not actually possess the evidence in question but could discover it in the exercise of due diligence. See, *e.g.*, *United States* v. *Meros*, 866 F.2d 1304, 1308 (11th Cir.) ("To establish a *Brady* violation a defendant must prove * * * that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence."), cert. denied, 493 U.S. 932 (1989); *Barnes* v. *Thompson*, 58 F.3d 971, 975 n.4 (4th Cir. 1995) ("*Brady* requires that the government disclose only evidence that is not available to the defense from other sources, either directly or through diligent investigation."). The Sixth Circuit has stated that the nondisclosure of possibly exculpatory material does not violate *Brady* when the "defendant was aware of the essential facts that would enable him to take advantage of the exculpatory evidence." *United States* v. *Todd*, 920 F.2d 399, 405 (1990). Those decisions can be understood to flow from this Court's admonition that the purpose of the *Brady* rule "is not to displace the adversary system as the primary

means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675.

3. Petitioner contends (Pet. 12-13) that the decisions cited above are in conflict with the Tenth Circuit's decision in *Banks* v. *Reynolds*, 54 F.3d 1508 (1995). That contention is incorrect.

In *Banks*, the prosecution failed to inform the defense that two other suspects had previously been arrested for the crime of which the defendant was later convicted. The court of appeals stated that "[i]n order to establish a *Brady* violation, a habeas petitioner must show that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material to the defense." 54 F.3d at 1516. The court rejected the prosecution's contention that it was not required to disclose the information regarding the prior arrests. The court offered the following analysis:

> Whether the defense knows or should know about evidence in the possession of the prosecution certainly will bear on whether there has been a *Brady* violation. Obviously, if the defense already has a particular piece of evidence, the prosecution's disclosure of that evidence would, in many cases, be cumulative and the withheld evidence would not be material.
>
> However, the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge. Simply stated, if the prosecution possesses evidence that, in the context of a particular case is obviously exculpatory, then it has an obligation to disclose it to defense counsel whether a general request is

> made or whether no request is made. In this case, the fact that defense counsel "knew or should have known" about the [pertinent] information, therefore, is irrelevant to whether the prosecution had an obligation to disclose the information. The only relevant inquiry is whether the information was "exculpatory."

Id. at 1517 (citations, brackets, and internal quotation marks omitted).[4] After determining that "the prosecution breached its obligation to disclose exculpatory evidence to the defense," *id.* at 1518, the court proceeded to "consider whether the withheld evidence was material," *ibid.*, and concluded, after lengthy analysis, that it was, see *id.* at 1518-1522.

The Tenth Circuit in *Banks* expressly acknowledged that the information the defense "knows or should know" is relevant to the question whether the withheld evidence is "material," and thus to the ultimate determination whether a *Brady* violation has occurred. The Tenth Circuit's approach differs from that adopted by other courts of appeals only insofar as the *Banks* court suggested that the government's obligation to disclose particular evidence can be determined without reference to the materiality of that evidence—*i.e.*, that the prosecution is

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[4] The *Banks* court also stated, however, that it "accept[ed] the [district] court's finding that [defense counsel] neither knew nor should have known about the withheld evidence." 54 F.3d at 1518. The court's statement that the prosecution's disclosure obligation is unaffected by what the defense knows or should know was therefore dictum. See *ibid.* ("Even were we to adopt the State's position, that the prosecution has no duty to disclose information which the defense knows or should know about, we would still conclude that, in this case, the prosecution breached its duty under *Brady*.").

obligated to disclose even non-material exculpatory information. That aspect of the Tenth Circuit's analysis appears contrary to this Court's precedents. See *Agurs*, 427 U.S. at 108 ("[T]he prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."); *Kyles*, 115 S. Ct. at 1568 (Court's *Brady* jurisprudence "does not tax the prosecutor with error for any failure to disclose, absent a further showing of materiality"). The crucial point, however, is that that aspect of the Tenth Circuit's approach will have no practical effect on the ultimate resolution of a defendant's *Brady* claim. The Tenth Circuit recognized that a *Brady* violation occurs only where the suppressed evidence is "material," 54 F.3d at 1516, and that "[w]hether the defense knows or should know about evidence in the possession of the prosecution certainly will bear on whether there has been a *Brady* violation," *id.* at 1517. Petitioner's claim of a circuit conflict is therefore without foundation.[5]

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[5] Petitioner's reliance (Pet. 12-13) on *Hatch* v. *Oklahoma*, 58 F.3d 1447, 1470 n.17 (10th Cir. 1995), cert. denied, 116 S. Ct. 1881 (1996), is similarly misplaced. Relying on *Banks*, the court in *Hatch* declined to consider the state of the defense's knowledge *in determining whether the prosecution had suppressed evidence.* 58 F.3d at 1469-1470 & n.17. Because it concluded that "petitioner ha[d] not alleged any facts showing that the prosecution suppressed evidence," *id.* at 1469-1470, the court had no occasion to consider the question of materiality. Nothing in *Hatch* casts doubt on the *Banks* court's conclusion that the range of information the defense knows or should know is relevant to the question whether any suppressed evidence is material.

4. Even if a circuit conflict did exist, this case would be an inappropriate vehicle for its resolution. Contrary to petitioner's contention (Pet. 8), the court of appeals' decision in the instant case does not rest solely on a determination that petitioner's trial counsel failed to exercise due diligence in acquiring evidence about Jake Butcher's exculpatory statements. Rather, the court also indicated that petitioner was in fact aware of Butcher's view that petitioner's banking activities were not illegal. The relevant paragraph of the court of appeals' opinion is as follows:

> It can hardly be argued by [petitioner] that the statements made by Butcher meet the *Bagley* materiality test since [petitioner] had to be aware of Butcher's opinion contained in the FBI 302 report. The district court found that "Mr. Butcher was well known to be friendly and available as a witness [and] known to have testified that there was nothing illegal about [petitioner's] role in [his] banking maneuvers." Indeed, [petitioner's] counsel interviewed Butcher prior to the trial. Clearly, [petitioner's] counsel could have called Jake Butcher to the stand at the trial to elicit his favorable statements, but they chose not to do so. Since [petitioner] should have been aware of Butcher's opinions, the failure to provide [petitioner] with the FBI 302 report is not a denial of a fair trial with regard to Butcher's substantive comments. *See United States* v. *Todd*, 920 F.2d 399, 405 (6th Cir. 1[9]90) (holding that there is no *Brady* violation when the defendant "was aware of the essential facts that would enable him to take advantage of the exculpatory evidence").

Pet. App. 10a-11a (citation omitted).

Petitioner offers the following critique of the court's analysis:

> The court of appeals never considered the exculpatory nature of the FBI 302—which, without more, should have sufficed to warrant its disclosure. The court likewise never analyzed the importance of that document—which, without more, should have satisfied the materiality standard under *Brady*. Instead, the court focused solely on petitioner's diligence in finding the evidence on his own.

Pet. 14. That assessment will not withstand scrutiny. The court of appeals did not suggest that petitioner should have obtained the FBI 302 on his own, through the exercise of due diligence. The court noted that petitioner had "requested all reports from any interviews with Jake Butcher and relied on the prosecutor's representation that all reports had been produced." Pet. App. 11a. And, rather than ignoring the "exculpatory nature" and "importance" of the 302 report (Pet. 14), the court took those points for granted, but found that the report was immaterial in light of what petitioner already knew about Butcher's opinions. Thus, the court quoted the district court's finding that "Mr. Butcher was well known to be friendly and available as a witness [and] known to have testified that there was nothing illegal about petitioner's role in their banking maneuvers." Pet. App. 10a. The court of appeals also stated that the report was immaterial because petitioner "had to be aware of Butcher's opinion contained in the FBI 302 report." *Ibid.* The court concluded that "[petitioner's] counsel could have called Jack Butcher to

the stand at the trial to elicit his favorable statements, but they chose not to do so." *Ibid.* Only *after* making those statements did the court also state that because "petitioner should have been aware of Butcher's opinion," the failure to disclose the report was not a denial of a fair trial. *Id.* at 10a-11a. Thus, the court's analysis, taken as a whole, does not rest on a simple conclusion that petitioner failed to exercise due diligence in learning of Butcher's opinion. The legal issue that petitioner raises is therefore not squarely presented by this case.

Petitioner also faults (Pet. 15) the court of appeals for failing to consider the exculpatory value of the FBI 302 report itself—"separate and apart from" its recitation of Butcher's opinion. That factbound claim raises no legal issue of importance. In any event, the court of appeals did not make such an error. Petitioner argues (Pet. 15) that "[a]rmed with the prior written statement, the defense could have called Jake Butcher—an otherwise recalcitrant witness—secure in the knowledge that the prior statement would afford a refreshed recollection, rehabilitation, or impeachment." Petitioner, however, never made that argument to the trial court or the appellate panel. See Pet. C.A. Reply Br. 24-25 (describing ways in which 302 report could have been used without suggesting that Butcher would have been called as a witness); C.A. App. 283-285, 347-348 (affidavits submitted to the district court). Petitioner's only argument about the potential use of the report itself was that it might have been valuable in impeaching Agent Horne—an argument the court of appeals addressed and rejected. See Pet. App. 9a-11a (describing and

rejecting petitioner's arguments).[6] Because petitioner never suggested that counsel would have called Butcher to testify if the 302 report had been available, he cannot make that argument for the first time in this Court.

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[6] Petitioner renews that argument here, stating that with the 302 report he could "have 'debunk[ed] the false appearance created for the jury that Horne was a disinterested expert hired by the government to review [petitioner's] financial records.'" Pet. 15-16 (quoting Pet. App. 40a). The court of appeals acknowledged that the 302 report might have been used in that manner. Pet. App. 11a. The court concluded, however, that "this type of impeachment does not satisfy the *Bagley* materiality standard" because "there is no reasonable probability that the outcome of the trial would have been different." *Ibid.* Petitioner disagrees with that conclusion, but he cannot quarrel with the legal standard applied by the court of appeals. Petitioner also contends in this Court that "through a skillful use of the Butcher memo during the cross-examination of Agent Horne, the defense could have called attention to *the government's failure* to call Jake Butcher as a witness." Pet. 16. The affidavits submitted to the district court by petitioner's trial counsel did not suggest that the 302 report would have been used in that manner. See C.A. App. 283-285, 347-348. In any event, the defense did not need the 302 report to make that point. In fact, defense counsel argued pointedly in closing statements that the jury had not heard from Jake Butcher. See 7/16/92 Closing Tr. 46, 57.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1996

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No. 95-2034

In the Supreme Court of the United States

OCTOBER TERM, 1996

KARL A. SCHLEDWITZ, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In the Tenth Circuit, prosecutors, pursuant to their *Brady* obligations, are required to disclose any "obviously exculpatory" evidence, regardless "of the defendant's knowledge." *Banks* v. *Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995) (internal quotation marks and citation omitted). As the Solicitor General is constrained to admit (Opp. 12-13), the Tenth Circuit has flatly, and repeatedly (see *id.* at 14 n.5), held that "[t]he only relevant inquiry" under *Brady* "is whether the information [is] 'exculpatory.'" 54 F.3d at 1517. If it is, then prosecutors have a duty to turn it over — even if, in their view, the defendant should be able to find the exculpatory evidence on his own.

By contrast, the Sixth Circuit, joined by several other circuits (see Pet. 10-11), has held that prosecutors have no duty under *Brady* to disclose exculpatory evidence "where the evidence is available to [the] defendant from another source." *United States* v. *Clark*, 928 F.2d 733, 738 (6th Cir.), cert. denied, 502 U.S. 846, 885 (1991). Because of the Sixth Circuit's "due diligence" exception to the *Brady* obligation, the prosecutors in this case were able to defend their failure to produce the Jake Butcher interview report on the ground that "the prosecution need not disclose allegedly exculpatory statements when they are readily available to the diligent defender." Gov't C.A. Br. 18-19. And the court below was able to reject petitioner's *Brady* claim on the ground that — notwithstanding the government's failure to produce the report — petitioner "should have been aware of Butcher's opinions." Pet. App. 10a.

The Solicitor General nevertheless insists (Opp. 9) that "no circuit conflict exists" on this critical issue of criminal procedure. But that is only because the Solicitor General fundamentally misapprehends, or simply misstates, the nature of the conflict. Perhaps recognizing the improbability of satisfying this Court that there is no conflict, the Solicitor General alteratively contends (Opp. 10) that "the instant case would be an inappropriate vehicle for resolving" the conflict.

But that is only because the government misreads the decision below and ignores the well-entrenched Sixth Circuit case law that the court below faithfully applied. For the reasons stated in the petition, further review is clearly warranted to consider this important issue of criminal procedure and to reject the "due diligence" exception to *Brady* that was invoked to deny petitioner's claim.

1. Had this case been prosecuted by the United States Attorney in Denver, Topeka, Salt Lake City, Oklahoma City, Albuquerque, or anywhere else in the Tenth Circuit, the government would have been obligated to turn over the Jake Butcher interview report. Unfortunately for petitioner, however, he was indicted in the Sixth Circuit — where, as in the Fourth, Fifth, and Eleventh Circuits (see Pet. 10-11), there is no duty to disclose exculpatory evidence that the defendant, in the exercise of due diligence, should be able to find for himself.

The Solicitor General grudgingly admits (Opp. 13) that "[t]he Tenth Circuit's approach differs from that adopted by other courts of appeals." He insists, however, that the conflict is ultimately immaterial. In the Solicitor General's view (*ibid.*), even the Tenth Circuit agrees that a defendant's exercise of due diligence "is relevant to the question whether the withheld evidence is 'material,' and thus whether a *Brady* violation has occurred." Thus, the Solicitor General maintains (Opp. 14), the Tenth Circuit's contrary "approach" to the disclosure obligation "will have no practical effect on the ultimate resolution of a defendant's *Brady* claim." He is wrong for two independent reasons.

First, he misreads the Tenth Circuit's opinion. While the court did state in *Banks* that "[w]hether the defense knows or should know about evidence in the possession of the prosecution certainly will bear on whether there has been a *Brady* violation" (54 F.3d at 1517), its explication of the point shows that it was speaking of *actual knowledge* of the exculpatory evidence, not merely *the failure to exercise due*

diligence, as affecting the materiality of the non-disclosure. As the court put the matter (*ibid.*; emphasis added): "Obviously, if the defense *already has a particular piece of evidence*, the prosecution's disclosure of that evidence would, in many cases, be cumulative and the withheld evidence would not be material." The proposition that a defendant cannot obtain relief under *Brady* for the failure to disclose evidence that he already possesses seems to us self-evidently correct. But it simply does not support the government's claim that the Tenth Circuit would find immaterial a failure to disclose exculpatory evidence merely because the defendant could have found the evidence on his own.

Indeed, the outcome of *Banks* confirms that the Tenth Circuit resolves *Brady* issues very differently from the Sixth Circuit. In *Banks*, the court granted habeas relief because the prosecutors failed to advise defense counsel that another suspect had previously been charged with the crime on which the defendant was ultimately convicted. It so held, even though the same defense lawyer had himself represented the prior suspect. Surely the Sixth Circuit, faced with those facts, would have held — as the panel did here — that the defense "should have been aware" (Pet. App. 10a) of the prior arrest, and that habeas relief was therefore unwarranted. The Tenth Circuit's contrary conclusion in *Banks* suggests that that circuit's resolution of *Brady* claims is now, and will (if unreviewed) continue to be, quite different.

But even if the Solicitor General's reading of *Banks* were sound, so that a failure to exercise due diligence would defeat a *Brady*-based new trial claim in the Tenth Circuit as well as in the Sixth and its compatriots, that does not eliminate the conflict or vitiate its practical importance. It would still be true that in the Tenth Circuit (but not in the Sixth, Fourth, Fifth, and Eleventh Circuits), *the government would have a duty to disclose the exculpatory material regardless of due diligence, and thus the practice of criminal law in the Tenth Circuit is fundamentally different from the practice elsewhere.*

The Solicitor General does not, and cannot, dispute that on this crucial issue of criminal practice the circuits are starkly divided.

Nor is it true, as the Solicitor suggests in a footnote (Opp. 13 n.4), that perhaps the Tenth Circuit's rejection of the "due diligence" exception is merely "dictum." True, the court of appeals in *Banks* went on to "accept" the trial court's finding that defense counsel "neither knew nor should have known about the withheld evidence." But, at most, that renders the "due diligence" rejection an alternative holding. And as the Solicitor General himself recognizes (Opp. 14 n.5), subsequent case law in the Tenth Circuit has followed the *Banks* court's rejection of the due diligence exception. In *Hatch* v. *Oklahoma*, 58 F.3d 1447 (10th Cir. 1995), cert. denied, 116 S. Ct. 1881 (1996), the court of appeals, following *Banks* (58 F.3d at 1470 n.17), refused, in assessing whether a prosecutor had failed to disclose exculpatory evidence, to "rely on the fact that the defense apparently was aware" of the undisclosed evidence. See also *United States* v. *McVeigh*, 923 F. Supp. 1310, 1313-1314 (D. Colo. 1996) (following *Banks* and holding that prosecutors have a duty to disclose "exculpatory evidence").

2. Recognizing, perhaps, that there really *is* a conflict on an issue of great practical importance, the Solicitor quickly adds (Br. 14) that "the Tenth Circuit's analysis appears contrary to this Court's precedents." That, of course, is not a reason to deny certiorari when the precedents the Tenth Circuit has allegedly misunderstood antedated its conflict-creating decision. In any event, it is the Sixth Circuit, not the Tenth Circuit, that has misapplied this Court's *Brady* decisions. As we stated in the petition (at 17-18) — and as the Solicitor General makes no effort to dispute — in *United States* v. *Agurs*, 427 U.S. 97 (1976), the government made the very "due diligence" argument that was pressed successfully by the prosecutors in the present case. This Court pointedly *refused*, however, to adopt that standard. See *id.*

at 106, 111. And in its subsequent *Brady* cases, the Court has never suggested, even in passing, that a prosecutor is free to withhold exculpatory evidence that he or she believes to be discoverable by the defense from other sources. To the contrary, as we stated in the petition (at 18-19), the Court's recent *Brady* cases undercut the contention that there is a due diligence exception to the disclosure obligation in *Brady*.[1]

3. Perhaps because it wishes to "keep its powder dry," or perhaps because it is not prepared to defend the Sixth Circuit's rule in this Court, the government never addresses our challenge to the merits of the due diligence exception to *Brady*. As we have explained (Pet. 13-16), the due diligence exception constricts the government's *Brady* obligations by encouraging prosecutors to withhold exculpatory evidence in the hopes that a reviewing court will later conclude that the defendant could have found the evidence for himself. Moreover, a prosecutor who withholds material in the face of a specific request (as here) thereby *encourages the defense to believe it does not exist*. See *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (Blackmun, J.). The due diligence exception, in short, turns a fundamental rule of due process into an advocate's game of "gotcha." Prosecutors, no less than any other advocate, "simply cannot be asked to maintain the requisite neutrality with regard to their own investiga-

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[1] The government cites (Opp. 14) *Agurs* and the more recent decision in *Kyles* v. *Whitley*, 115 S. Ct. 1555 (1995), for the proposition that a prosecutor's failure to disclose exculpatory evidence might not violate the Constitution if the evidence is not material. But that hardly means, as the government suggests (Opp. 14), that the Tenth Circuit's decision is at odds with this Court's rulings. Nothing in this Court's cases suggests that evidence is "immaterial," and thus free from constitutional scrutiny, merely because the defendant could have found the exculpatory evidence on his own.

tions." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 450 (1971).

The Solicitor General offers not a word in defense of this extraordinary exception to *Brady*. Nor does he dispute that the question presented in this case is important. He could hardly have done so in any event. As amicus curiae National Association of Criminal Defense Lawyers (NACDL) points out (Br. 2), there is already a highly "restricted scope of federal criminal discovery" and even more limited discovery in many states. See *Degen* v. *United States*, 116 S. Ct. 1777, 1781 (1996) ("[a] criminal defendant is entitled to rather limited discovery"); *Weatherford* v. *Bursey*, 429 U.S. 545, 559-561 (1977). Indeed, the NACDL observes, in some states "there is virtually no criminal discovery" at all. In those states, but elsewhere as well, the rule in *Brady* can afford criminal defendants some vitally important insight into the strengths or weaknesses of the case against them. As the NACDL correctly adds (Br. 2), "[t]he 'due diligence' exception to *Brady* adopted by the Sixth Circuit and some other courts seriously undermines the effectiveness of the *Brady* rule and is plainly at odds with its purpose."

Neither does the Solicitor General dispute that the question presented is a recurring one in the criminal justice system. Again, he could hardly have done so. As we stated in the petition (at 19), the scope of the government's *Brady* obligations is at issue in virtually every criminal trial in this country. In at least four circuits, but not in the Tenth Circuit, prosecutors are free to withhold exculpatory evidence whenever, in their estimation, the defense can find it on its own. One can hardly imagine a more basic issue for the day-to-day conduct of criminal litigation.

4. Fresh out of options, the Solicitor General contends (Opp. 15) that "[e]ven if a circuit conflict did exist, this case

would be an inappropriate vehicle for its resolution."[2] In his view (*ibid.*), "the court of appeals' decision in the instant case does not rest solely on a determination that petitioner's trial counsel failed to exercise due diligence in acquiring evidence about Jake Butcher's exculpatory statements. Rather, the court also indicated that petitioner was in fact aware of Butcher's view that petitioner's banking activities were not illegal."

This contention is flawed at every turn. First, the government has completely misread the court's opinion. The government relies (Opp. 15-16) on a portion of the opinion in which the court of appeals surmised that petitioner "had to be aware of Butcher's opinion." But that manifestly is *not* a way of saying that petitioner was, *in fact*, aware of Butcher's opinions, but only that petitioner *ought* to have had such knowledge. As if the point were not already sufficiently clear, the court of appeals went on to state — in language that supports no competing interpretation — that "[s]ince [petitioner] *should have been aware* of Butcher's opinions, the failure to provide [petitioner] with the FBI 302 report is not a denial

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[2] The government also intimates (Opp. 3 n.2), without quite saying so, that perhaps this case should not be granted because the exculpatory statements at issue bear on only one of the three counts of which defendant was convicted. But that is simply not so. As we explained in the petition (at 2), and as the government fails to refute, the indictment in this case charged a scheme to defraud that covered *each* of the counts at issue. As part of that alleged scheme, petitioner was said to have defrauded "various Butcher-controlled banks" by taking out loans in his own name, while at the same time using the proceeds "for the personal and political benefit of the Butchers." C.A. App. 15. The FBI 302 withheld by the government in this case bore critically on those allegations, and thus applied to each of the three counts of which petitioner was convicted.

of a fair trial with regard to Butcher's substantive comments." Pet. App. 10a-11a (emphasis added).[3]

The government also overlooks the fact that the court of appeals' decision in this case applied settled Sixth Circuit case law adopting the due diligence exception. The court cited (Pet. App. 11a) *United States* v. *Todd*, 920 F.2d 399 (6th Cir. 1990), in which the Sixth Circuit had held that the government had no duty to disclose interview reports of key co-conspirators, despite a specific pretrial request, where the defendant had access to the witnesses and knew that they could "possibly" exculpate him. *Id.* at 404-405. In light of that citation, there is no reason not to take the Sixth Circuit at its word — *i.e.*, that petitioner lost his new trial motion because he "should have been aware of Butcher's opinions" even without disclosure by the prosecutors. Pet. App. 10a-11a.

In all events, in light of the importance of the issue, it makes no sense to await a more "appropriate vehicle" for resolving the question presented. *Brady* issues, it bears repeating, are the daily fare of criminal litigation. Across the country, prosecutors — like the Solicitor General in this case (see Br. 14) — insist that it is "contrary to this Court's precedents" to require the government to turn over exculpato-

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[3] It is inconceivable that the court of appeals could have found, as a matter of fact, that petitioner had actual knowledge of the opinions Butcher provided to the FBI during his 1985 interview. As we noted in the petition (at 6 n.1), Butcher submitted an affidavit to the trial court stating that, by 1992, he himself no longer had any recollection of what he had told the FBI during his interview seven years earlier. To the contrary, Butcher added, he "had spent the last seven years trying to erase the memory of the events" of this case. C.A. App. 355-356. Thus, Butcher could not, and did not, provide petitioner's counsel with any indication of opinions he had given to the FBI. Indeed, he did not even tell defense counsel that an FBI interview had taken place. *Ibid.*

ry material that the defense can find on its own. That is exactly what the prosecutors in this case told the Sixth Circuit (Gov't C.A. Br. 18-19). But it is just plain wrong, and this Court should grant review and say so.

5. Finally, the government fails to refute our showing (Pet. 14-16) that the court of appeals' due diligence rule had devastating consequences for the disposition of petitioner's new trial motion. For example, we pointed out (Pet. 14) that the court below never considered the exculpatory nature of the FBI 302 or the importance of the evidence it contained. Remarkably, the Solicitor General insists (Opp. 16) that the court of appeals simply "took those points for granted" in its analysis. We profess no comparable ability to read the panel's mind. It suffices to note that, if the court of appeals *did* take those points for granted, it did so *sub silentio*.

We also pointed out (Pet. 15) that the court of appeals failed to consider the fact that, had petitioner been given the FBI 302, he could have called Butcher (a highly recalcitrant witness) to the stand, secure in the knowledge that the statement could be used to bolster (or impeach) Butcher's testimony. The government claims (Opp. 17) that this argument should be overlooked because it was never called to the panel's attention. But the issue must evidently have been sufficiently plain to enable Chief Judge Merritt to rely at length on that very point in his dissent from the denial of rehearing en banc. Pet. App. 39a.

6. The sum of the matter is this: The court of appeals rejected petitioner's new trial motion without regard to the exculpatory nature of the Butcher interview report, and without regard to its potential impact on the outcome of the trial. By the panel's lights, it was sufficient that petitioner should have, through the exercise of due diligence, found out about the statements on his own.

That turns the rule of *Brady* on its head. Further review is warranted to resolve the circuit conflict on this important and recurring issue of criminal trial practice.

CONCLUSION

For the foregoing reasons, and the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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